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NOTES

AMERICA'S DARK LITTLE SECRET: CHALLENGING THE CONSTITUTIONALITY OF THE CIVIL RIGHTS PROVISION OF THE 1994 VIOLENCE AGAINST WOMEN ACT

Jennifer Lynn Crawford⁺

The United States Constitution grants distinct powers to each of the three separate branches of government.¹ Among Congress's enumerated powers is the sole authority to regulate commerce among the states.²

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1. See U.S. CONST. arts. I, II, III. The Constitution grants Congress a variety of powers. See U.S. CONST. art. I, § 8, cl. 4 (power to establish laws regarding bankruptcy and naturalization of citizens); *id.* cl. 5. (power to coin money); *id.* cl. 7 (power to establish post offices); *id.* cl. 8 (power to grant intellectual property rights); *id.* cl. 11 (power to declare war); *id.* cl. 14 (power to regulate naval forces).

2. See *id.* cl. 3. The Constitution grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *Id.* Commerce played a central role in the early development of the nation and the Constitution and was of primary focus at the Constitutional Convention. See 1 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 310-11 (1916) (explaining that at the time of the Constitutional Convention, states treated each other as if each was a foreign nation by creating discriminatory restrictions on commerce); CARL BRENT SWISHER, *AMERICAN CONSTITUTIONAL DEVELOPMENT* 25-27 (2d ed. 1954) (discussing the importance of the federal government's control over interstate commerce to promote industry and prohibit commercial barriers between the states); Vincent A. Cirillo & Jay W. Eisenhofer, *Reflections on the Congressional Commerce Power*, 60 TEMP. L.Q. 901, 905 (1987) (noting that Constitutional Convention delegates recognized the need for federal supervision of interstate commerce); David G. Wille, *The Commerce Clause: A Time for Reevaluation*, 70 TUL. L. REV. 1069, 1077 (1996) (stating that the Commerce Clause's purpose is "to maintain free trade among the States").

The states may not infringe upon³ this plenary and absolute power.⁴ Inherent in the commerce power is the ability to prohibit commerce that adversely affects the national welfare.⁵ Broadly defined, commerce includes not only traditional concepts of commercial activity, but also non-commercial activities that have some effect on commerce.⁶

3. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1063, at 513 (Fred B. Rothman & Co. 1991) (1833) (highlighting that a grant of absolute power to Congress necessarily precludes any state action). See generally *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833) (addressing the reasons behind constitutional limitations on the federal government's power). In his commentaries, Justice Story stated that absent congressional regulation in a particular area of commerce, the states retained the power to act in that area unless such regulation was incongruous with Congress's commerce power. See 2 STORY, *supra*, § 1069, at 517; see also Muriel Morisey Spence, *What Congress Knows and Sometimes Doesn't Know*, 30 U. RICH. L. REV. 653, 657 (1996) (noting that states have the power to regulate in those areas which the Constitution does not address). If Congress later passed a law regulating commerce which would conflict with existing state law, federal law would prevail. See 2 STORY, *supra*, § 1069, at 517; cf. CHESTER JAMES ANTIEAU, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 25-26 (1960) (discussing the development of the Supreme Court's doctrine on the interaction of federal and state law, and stating that at one time the Supreme Court held that when the two conflict, federal law trumped state law). But cf. *California v. Zook*, 336 U.S. 725, 730 (1949) (explaining that "the fact of identity does not mean the automatic invalidity of state measures").

4. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824) (stressing the singular and plenary powers of Congress under the Commerce Clause); see also *Brown v. Houston*, 114 U.S. 622, 630 (1885) (affirming the absolute power of Congress to regulate interstate commerce); 2 STORY, *supra* note 3, § 1063, at 513 (commenting on Congress's exclusive power to regulate interstate commerce); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-4, at 306 (2d ed. 1988) (interpreting the Commerce Clause as providing Congress with regulatory powers subject only to constitutional prohibitions).

5. See Edward S. Corwin, *Congress's Power to Prohibit Commerce: A Crucial Constitutional Issue*, 18 CORNELL L.Q. 477, 477 (1933) (discussing Congress's regulatory power to pass legislation to promote national welfare); see also 1 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.1, at 356 (2d ed. 1992) (commenting on Congress's ability to restrict the application of certain state laws which adversely affect interstate commerce); III BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES, vol. 2, at 615 (1968) (stating that Congress has the power to prohibit commerce adversely affecting social, economic, or moral values).

6. See *Champion v. Ames (the Lottery Case)*, 188 U.S. 321, 356-57 (1903). In the years surrounding the *Lottery Case*, federal courts increasingly indicated a willingness to uphold federal regulation in areas that affected public health and welfare. See, e.g., *Hoke v. United States*, 227 U.S. 308, 322 (1913) (providing that Congress may prohibit white slave traffic under the Mann Act as a means to defeat "the motive and evils of its manufacture"); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 57-58, 60 (1911) (upholding the Pure Food and Drug Act of 1906's ban on the transportation of impure and unwholesome food); *United States v. Popper*, 98 F. 423, 424 (N.D. Cal. 1899) (affirming Congress's authority under the Commerce Clause to prohibit the interstate carriage of contraceptive devices).

In the *Lottery Case*, for example, the Court upheld the constitutionality of a federal act

The Commerce Clause permits congressional regulation of three broad areas of commerce.⁷ First, Congress can regulate the channels of interstate commerce, including the interstate transportation of goods, services, or people.⁸ Regulation of the channels of interstate commerce may include the prohibition of shipments of stolen goods or kidnapped persons.⁹ Second, Congress has the power to regulate or protect the instrumentalities of interstate commerce from any intrastate threat.¹⁰ For example, Congress can regulate highways, bridges, and railroads as instrumentalities of interstate commerce even if each is located solely within one state.¹¹ Finally, Congress can regulate those intrastate activities that have a substantial relation to or substantial effect on interstate

prohibiting the interstate movement of lottery tickets. See *The Lottery Case*, 188 U.S. at 363. The Court acknowledged that the Act had a closer connection to public morals than interstate commerce. See *id.* at 356-57. Therefore, although Congress's intent may have been to prohibit such unwholesome activity, the Court upheld the regulation because the movement of lottery tickets actually affected interstate commerce. See *id.* at 357; see also CRAIG R. DUCAT & HAROLD W. CHASE, CONSTITUTIONAL INTERPRETATION: POWERS OF GOVERNMENT 363 (5th ed. 1992) (noting that the commerce power provides for the ancillary regulation of health, safety, and welfare); III SCHWARTZ, *supra* note 5, vol. 2, at 615 (noting moral, social, and economic purposes for Commerce Clause regulation).

7. See *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (acknowledging that Congress may regulate the channels and instrumentalities of interstate commerce, as well as "activities having a substantial relation to interstate commerce"); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77 (1981) (same); *Perez v. United States*, 402 U.S. 146, 150 (1971) (same); *Doe v. Doe*, 929 F. Supp. 608, 612 (D. Conn. 1996) (same); see also 1 ROTUNDA & NOWAK, *supra* note 5, § 4.8, at 394-98 (discussing the different areas of commerce regulation).

8. See *Katzenbach v. McClung*, 379 U.S. 294, 296-98 (1964) (finding that business activities fell under Commerce Clause regulation when products used in the business were shipped through the channels of interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 256 (1964) (noting that the movement of people across state lines constitutes interstate commerce); *United States v. Darby*, 312 U.S. 100, 114 (1941) (recognizing congressional power to regulate the channels of interstate commerce).

9. See *Perez*, 402 U.S. at 150 (listing examples of congressional regulation of the channels of interstate commerce).

10. See *id.* (reporting that interstate shipments are "instrumentalities" of interstate commerce that Congress may protect from events such as theft or sabotage); *Southern Ry. Co. v. United States*, 222 U.S. 20, 27 (1911) (finding railroad lines to be instrumentalities of interstate commerce regardless of whether the trains using the rails traveled out of state). The Court in *United States v. E.C. Knight Co.* explained that Congress could regulate the transportation of goods between states because the goods formed an actual part of the total interstate transaction. See 156 U.S. 1, 13 (1895).

11. See *Alstate Constr. Co. v. Durkin*, 345 U.S. 13, 16 (1953) (recognizing Congress's authority to regulate highways); *Overstreet v. North Shore Corp.*, 318 U.S. 125, 130 (1943) (bridges); *Houston, E. & W. Tex. Ry. Co. v. United States* (the *Shreveport Rate Case*), 234 U.S. 342, 351-52 (1914) (railroads); *United States v. Bishop*, 66 F.3d 569, 588-89 (3d Cir.) (upholding a federal carjacking statute on the basis that Congress may regulate the motor vehicle as an instrumentality of interstate commerce, regardless of where the car is operated), *cert. denied*, 116 S. Ct. 681 (1995).

commerce.¹² If such activity is considered commercial, it is irrelevant whether the effect on interstate commerce is direct or indirect, as long as an actual effect exists.¹³ If such intrastate activity is not commercial in nature, the Court requires a more direct connection, not merely an effect on interstate commerce in order to uphold congressional regulation.¹⁴

In the past decade of Commerce Clause jurisprudence, the Supreme Court has struggled to establish a practical definition of "effect" as applied to the third area of congressional regulation.¹⁵ The Court has sought, in some opinions, to distinguish between "direct" and "indirect" effects on commerce, while other opinions have focused on the magnitude of the effect.¹⁶ Most recently, the Supreme Court has attempted to clarify the third area of regulation by rejecting a strict "effect" theory, and narrowing its analysis to find regulation permissible if an activity

12. See *Maryland v. Wirtz*, 392 U.S. 183, 189-90 (1968) (affirming federal regulation of intrastate activities having a substantial relationship to interstate commerce), *overruled by* *National League of Cities v. Usery*, 426 U.S. 833 (1976); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (same).

13. See *United States v. Lopez*, 514 U.S. 549, 559-60 (1995) (discussing the regulation of intrastate activities having a substantial relation to interstate commerce); *Wirtz*, 392 U.S. at 196-97 (affirming federal regulation of intrastate activities engaged in by a state and having a substantial relationship to interstate commerce); *Jones & Laughlin*, 301 U.S. at 37 (defining the "substantially affects" analysis used to determine whether Congress may regulate activities that are "intrastate in character").

14. Cf. *Lopez*, 514 U.S. at 567-68 (requiring that Congress articulate clear findings on how a non-commercial activity affects interstate commerce).

15. See, e.g., *id.* at 559 (noting confusion in the third category of regulation regarding the difference between "affect" and "substantially affect"); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 537 (1985) (stating that a regulated activity need only "affect," not "substantially affect," interstate commerce); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment) (commenting that the ultimate decision as to whether an activity "substantially affects" interstate commerce remains a judicial decision, regardless of congressional findings). See generally Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995) (providing an overview of modern Commerce Clause jurisprudence).

16. Compare *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 548-49 (1935) (determining that Congress's regulation of an intrastate industry was in excess of its power because the regulated activity was too indirectly related to interstate commerce), with *Lopez*, 514 U.S. at 559 (concluding that "the proper test . . . [is] whether the regulated activity 'substantially affects' interstate commerce"), and *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (utilizing a cumulative effect theory to determine the magnitude of an activity on interstate commerce). Supreme Court jurisprudence prior to the New Deal era primarily interpreted the Commerce Clause in relation to the Tenth Amendment. See 1 ROTUNDA & NOWAK, *supra* note 5, § 4.8, at 394. The Tenth Amendment reads: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. Once the Court began to accept the Commerce Clause as an independent grant of authority, it moved away from the distinctions made in *Schechter* concerning direct and indirect effects on commerce. See 1 ROTUNDA & NOWAK, *supra* note 5, § 4.8, at 394.

"substantially affects" interstate commerce.¹⁷ Absent from the Supreme Court's analysis, however, is a clear, standardized test for lower courts to follow.¹⁸ As a result, lower courts continue to struggle to find a working definition of the term "substantially affect."¹⁹

One of the latest judicial inquiries into the area of interstate commerce concerns the 1994 Violence Against Women Act (VAWA).²⁰ Congress enacted VAWA as Title IV of the Violent Crime Control and Law Enforcement Act, a small portion of the federal Omnibus Crime Package.²¹ Congress promulgated the Act to comprehensively address problems associated with the nationwide escalation of violence against women.²² The

17. See *Lopez*, 514 U.S. at 559 (refusing to extend the commerce power to regulate activities having only a remote or trivial effect on interstate commerce and declaring that the proper test to use when analyzing an exercise of commerce power is "whether the regulated activity 'substantially affects' interstate commerce"); see also Rachel Elizabeth Smith, Note, *United States v. Lopez: Reaffirming the Federal Commerce Power and Re-membering Federalism*, 45 CATH. U. L. REV. 1459, 1495-96 (1996) (advocating support for the *Lopez* Court's reasoning in invalidating the Gun-Free School Zones Act).

18. See John P. Frantz, Recent Development, *The Reemergence of the Commerce Clause as a Limit on Federal Power: United States v. Lopez*, 19 HARV. J.L. & PUB. POL'Y 161, 161 (1995) (stating that the meaning of "affects" versus "substantially affects" remains unclear despite the *Lopez* ruling); cf. Tom Stacy, *What's Wrong With Lopez*, 44 U. KAN. L. REV. 243, 261 (1996) (arguing that *Lopez* fails to resolve the conflicts in modern federalism); Alan R. Arkin, Comment, *Inconsistencies in Modern Federalism Jurisprudence*, 70 TUL. L. REV. 1569, 1599 (1996) (reasoning that *Lopez* illustrated "the inconsistencies of modern federalism jurisprudence").

19. See Deanne L. Dissinger, Recent Decision, 69 TEMP. L. REV. 507, 518-19 (1996) (noting that a court which upheld the constitutionality of the Anti Car Theft Act of 1992 applied a modified "substantially affects" test); cf. Lan Hoang, Note, *Freedom of Access to Clinic Entrances Act*, 18 U.S.C. § 248: *The Controversy Behind the Remedy*, 20 SETON HALL LEGIS. J. 128, 166-68 (1996) (advocating the constitutionality of the Freedom of Access to Clinic Entrances Act, despite the Court's decision in *Lopez*).

20. Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (codified as amended in scattered sections of 8, 18, and 42 U.S.C.). VAWA is divided into five specific areas addressing violence against women: Title I, Safe Streets for Women; Title II, Safe Homes for Women; Title III, Civil Rights for Women; Title IV, Safe Campuses; and, Title V, Equal Justice for Women in the Courts. See *id.*

21. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (codified as amended in scattered sections of 18, and 42 U.S.C.). The Omnibus Crime Package includes other provisions concerning DNA identification, drug-free truck stops, driver's privacy, and child abuse programs. See Pub. L. No. 103-322, 108 Stat. 1799, 1803-05 (codified as amended in scattered sections of 18, 21, 28 and 42 U.S.C.).

22. See Elizabeth M. Schneider, *Introduction: The Promise of the Violence Against Women Act of 1994*, 4 J.L. & POL'Y 371, 371 (1996) (describing how Congress intended to address "the problem of violence against women through a variety of . . . mechanisms"); Michelle W. Easterling, Comment, *For Better or Worse: The Federalization of Domestic Violence*, 98 W. VA. L. REV. 933, 938-40 (1996) (summarizing testimony presented to Congress concerning nationwide statistics on domestic violence); see also Martha F. Davis & Susan J. Kraham, Editorial, *Beaten, Then Robbed*, N.Y. TIMES, Jan. 13, 1995, at A31 (referring to studies finding that 50% to 90% of abused women were unable to escape

Act attempts to provide relief for survivors of gender-based violence not only through legal channels,²³ but also through enhanced funding for women's shelters,²⁴ rape education and prevention programs,²⁵ and many other non-traditional remedies.²⁶ Faced with statistics demonstrating a

their batterers due to financial restraints); Ann Devroy, *Analysts Dispute Clinton On Crime Against Women*, WASH. POST, Mar. 22, 1995, at A8 (commenting on statistical evidence reflecting the number of domestic violence victims); Kris Henry, *Clinton Announces \$26 Million For Women's Programs*, STAR TRIBUNE (Minneapolis), Mar. 22, 1995, at A6 (discussing how violent acts against women are growing almost three times faster than the overall national crime rate); *National Task Force on Violence Against Women* (NOW Legal Defense & Educ. Fund, Washington, D.C.), July 24, 1996, at 5 (noting that "violence is the leading cause of injury to women aged 15-44"); *The "Safety Net" Saves Lives: Supporting Women and Families in the Face of Violence* (NOW Legal Defense & Educ. Fund, Washington, D.C.), July 1996, at 1 (citing studies in which 25% to 30% of battered women responding lost jobs due in part to domestic violence); *The "Safety Net" Saves Lives: Supporting Women and Families in the Face of Violence* (NOW Legal Defense & Educ. Fund, Washington, D.C.), Dec. 1995, at 1 (stressing that 50% of abused women miss at least three days of work per month because of complications from abuse). *But cf.* Wendy McElroy, *The Unfair Sex?*, NAT'L REV., May 1, 1995, at 74 (discussing statistics showing the amount of domestic violence committed by women against men); Frank S. Zepezauer, Symposium, *Does the Violence Against Women Act Discriminate Against Men?*, INSIGHT MAG., May 27, 1996, at 24, available in 1996 WL 8311171 (calling government programs aimed at protecting women's rights part of a "feminist bureaucracy").

23. See 18 U.S.C. § 2262(a) (1994) (criminalizing stalking and harassing of one's spouse when the perpetrator crosses state lines); 42 U.S.C. § 13981(c) (1994) (providing a civil rights remedy for survivors of gender-based violence); 42 U.S.C. §§ 13992, 14001 (1994) (allocating funds for training for federal and state judges on the subject of gender-based violence). Another key provision of the Act is the full faith and credit clause, which provides for the interstate enforcement of protection orders. See 18 U.S.C. § 2265 (1994). Prior to VAWA, states were not bound to recognize protection orders issued in other states. See Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253, 255 (1995). Without giving full faith and credit to orders issued in other states, victims were protected only as long as they remained within the issuing state's borders. See *id.* VAWA mandates that a protection order issued in one state must be accorded full faith and credit in a tribunal in any other state. See 18 U.S.C. § 2265(a); see also Klein, *supra*, at 255 (discussing the ramifications of the full faith and credit provision of VAWA in comparison to past procedures for enforcing out-of-state protection orders).

24. See 42 U.S.C. § 10402(a) (1994) (providing housing assistance for survivors of domestic violence).

25. See *id.* at § 10418(a) (providing block grants for organizations to sponsor domestic violence awareness programs).

26. See 8 U.S.C. § 1154(a) (1994) (providing relief for battered immigrant women); 42 U.S.C. § 10416(a) (1994) (providing funding for a national domestic abuse hotline). The House of Representatives voiced specific concerns about the rights of non-citizen victims of domestic abuse. See H.R. REP. NO. 103-395, at 26 (1993). The House Report commented that under law existing at the time of VAWA, the rights of a non-citizen spouse were under the control of the citizen-spouse. See *id.* For example, the House Report discussed how a resident may, but is not required to, request a visa petition for the alien spouse. See *id.* The citizen can revoke the petition at any time, denying the alien spouse the opportunity to obtain citizenship and rights. See *id.* Thus, a battered alien spouse may

national escalation of violence against women,²⁷ coupled with evidence connecting such violence to interstate commerce,²⁸ a bipartisan Con-

fail to report instances of abuse for fear of retaliation or deportation. *See id.*

27. *See supra* note 22 (giving statistics of the alarming rise of domestic abuse and overall violence against women in the United States). After four years of testimony, Congress found that:

In 1991, at least 21,000 domestic crimes were reported to the police every week; at least 1.1 million reported assaults . . . were committed against women in their homes that year; unreported domestic crimes have been estimated to be more than three times this total.

S. REP. NO. 103-138, at 37 (1993).

Violence is the leading cause of injuries to women ages 15 to 44, more common than automobile accidents, muggings, and cancer deaths combined. As many as 4 million women a year are the victims of domestic violence. Three out of four women will be the victim of a violent crime sometime during their life.

Id. at 38 (citations omitted). "Every week, during 1991, more than 2,000 women were raped, and more than 90 women were murdered—9 out of 10 by men." *Id.*

An estimated 4 million American women are battered each year by their husbands or partners. Approximately 95% of all domestic violence victims are women. About 35% of women visiting hospital emergency rooms are there due to injuries sustained as a result of domestic violence. One study of battered women found that 63 percent of the victims had been beaten while they were pregnant.

H.R. REP. NO. 103-395, at 26; *see also* Mary C. Carty, Comment, *Doe v. Doe and the Violence Against Women Act: A Post-Lopez Commerce Clause Analysis*, 71 ST. JOHN'S L. REV. 465, 466-69 (1997) (describing a reluctance by "modern American society" to recognize domestic violence as a national problem); W.H. Hallock, Note, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 582-83 (1993) (providing statistics demonstrating more violence against women than men, and categorizing this violence as "hate crime victimization").

28. *See* S. REP. NO. 103-138, at 54. In finding a connection between violence against women and interstate commerce, the Senate committee found:

[S]tudies report that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime. Even the fear of gender-based violence affects the economy because it deters women from taking jobs in certain areas or at certain hours that pose a significant risk of such violence.

Id.

gress²⁹ passed VAWA to combat the harsh results of this violence.³⁰ One of the most innovative and controversial aspects of VAWA is the civil rights provision,³¹ which provides a civil remedy for survivors of gender-based violence.³² The provision declares that violence motivated by gender violates a victim's federal civil rights.³³ Congress enacted the civil rights provision to provide a nationally uniform remedy for victims of

29. See Patricia Schroeder, *Stopping Violence Against Women Still Takes a Fight: If in Doubt, Just Look at the 104th Congress*, 4 J.L. & POL'Y 377, 377-78 (1996) (noting that the House of Representatives unanimously passed VAWA as a part of the Omnibus Crime Bill of 1994). The Honorable Patricia M. Schroeder, a Democrat from Colorado, was a member of the House of Representatives during the 104th Congress and an avid proponent of VAWA. Senator Joseph Biden (D-Del.) originally introduced the Act to Congress in 1990. See S. REP. NO. 103-138, at 37. The bill died in committee during the 102nd Congress, was reintroduced by Biden and Representative Barbara Boxer (D-Cal.) in 1993, was passed by both houses of Congress, and was signed into law on September 13, 1994. Cf. Remarks on Signing the Violent Crime Control and Law Enforcement Act of 1994, 2 PUB. PAPERS 1539, 1539 (Sept. 13, 1994). In addition to the efforts of Senator Biden and Representative Boxer, VAWA gained support from Representatives Schroeder and Newt Gingrich (R-Ga.), and Senators Alfonse D'Amato (R-N.Y.), Orrin Hatch (R-Utah), Edward Kennedy (D-Mass.), and Olympia Snowe (R-Me.).

30. See Violence Against Women Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796, 1902-55 (1994) (codified as amended in scattered sections of 8, 18, and 42 U.S.C.). Congress's primary goal in enacting VAWA was to increase awareness about domestic violence and violence against women and to recognize publicly such violence as a national problem. See Wendy Rae Willis, Note, *The Gun is Always Pointed: Sexual Violence and Title III of The Violence Against Women Act*, 80 GEO. L.J. 2197, 2202 (1992). Congress intended VAWA to respond to "the underlying attitude that [domestic] violence is somehow less serious than other crime." S. REP. NO. 103-138, at 38. Secondly, the Act attempts to provide relief for victims of gender-motivated violence in the same way as victims of race-motivated violence. See Willis, *supra*, at 2202. Finally, VAWA provides relief for victims of gender-based discrimination to supplement often inadequate state remedies. See *id.*; Julie Goldscheid & Susan Kraham, *The Civil Rights Remedy of the Violence Against Women Act*, 29 CLEARINGHOUSE REV. 505, 505-06 (1995) (discussing the inadequacy of state and federal laws prior to VAWA in protecting people from gender-motivated violence).

31. See Goldscheid & Kraham, *supra* note 30, at 505 (calling the civil rights provision "historic"); Schneider, *supra* note 22, at 371 (identifying the civil rights remedy as "innovative"); Carolyn Peri Weiss, Recent Development, *Title III of the Violence Against Women Act: Constitutionally Safe and Sound*, 75 WASH. U. L.Q. 723, 733 (1997) (describing the civil rights provision of the Act as "the most controversial").

32. See 42 U.S.C. § 13981(a) (1994). The civil rights provision of the Violence Against Women Act of 1994 reads in part:

[I]t is the purpose of this part to protect the civil rights of victims of gender motivated violence and to promote public safety, health, and activities affecting interstate commerce by establishing a Federal civil rights cause of action for victims of crimes of violence motivated by gender.

Id. The Act defines a "crime of violence motivated by gender" as "a crime of violence committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender." *Id.* § 13981(d)(1).

33. See *id.* § 13981(a).

crimes specifically motivated by gender³⁴ and to limit the effect of gender-motivated violence on interstate commerce.³⁵ Congress adopted the Act pursuant to its powers under the Commerce Clause³⁶ and Section 5 of the Fourteenth Amendment.³⁷

Entertaining claims that the civil rights provision of VAWA exceeded Congress's commerce power, two District Court judges reached opposite conclusions on the issue.³⁸ In *Doe v. Doe*,³⁹ the United States District Court for the District of Connecticut held that because gender-motivated violence substantially affects interstate commerce, Congress acted within its constitutional power to enact the civil rights provision of VAWA.⁴⁰ One month after the decision in *Doe*, the United States District Court for the Western District of Virginia, in *Brzonkala v. Virginia Polytechnic & State University*,⁴¹ held that gender-motivated crimes do not substantially

34. See Goldscheid & Kraham, *supra* note 30, at 506. Goldscheid and Kraham noted that Congress recognized that:

[M]illions of women and girls who each year become victims of rape, domestic violence and many other crimes are not selected at random, nor are they singled out because of their individual circumstances; rather, they are exposed to terror, brutality, serious injury and even death because of their sex.

Id. at 505 (quoting *Women and Violence: Hearing Before the Senate Comm. on the Judiciary*, 101st Cong., 2d Sess. 57 (1990) (statement of Helen Neuborne)). Goldscheid and Kraham also emphasize that the civil rights remedy of VAWA provides an opportunity for redress for victims of gender-motivated violence, where adequate remedies previously did not exist. See *id.* at 506.

35. See *supra* note 28 (citing legislative history describing the economic effects of gender-motivated violence).

36. See *supra* note 2 (discussing Congress's authority under the Commerce Clause). Congress has regulated criminal activity through its commerce power in many instances, including: the Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789; the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181; the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207; and the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837.

37. See 42 U.S.C. § 13981(a) (1994); S. REP. NO. 103-138, at 54 (1993). Section 5 of the Fourteenth Amendment states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. The constitutionality of VAWA under the Fourteenth Amendment is beyond the scope of this Note.

38. See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 801 (W.D. Va. 1996) (holding that VAWA was an unconstitutional exercise of the commerce power), *rev'd*, No. 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997); *Doe v. Doe*, 929 F. Supp. 608, 617 (D. Conn. 1996) (upholding the civil rights provision of VAWA as a proper exercise of Congress's commerce power); see also *Courts Split in Rulings on VAWA's Constitutionality* (NOW Legal Defense & Educ. Fund, New York, N.Y.), 1996, at 1-2 (discussing the arguments and rulings made in *Brzonkala* and *Doe*).

39. 929 F. Supp. 608 (D. Conn. 1996).

40. See *id.* at 613, 617.

41. 935 F. Supp. 779 (W.D. Va. 1996), *rev'd*, No. 96-2316, 1997 WL 785529 (4th Cir.

affect interstate commerce and, therefore, the civil rights remedy of VAWA was unconstitutional.⁴² The United States Court of Appeals for the Fourth Circuit reversed the district court's decision in *Brzonkala*, and in agreement with *Doe*, found that Congress legislated within its constitutionally authorized power in its enactment of the civil rights provision of VAWA.⁴³

This Note first traces Supreme Court Commerce Clause jurisprudence on congressional regulation of activities that substantially affect interstate commerce. This Note then discusses the first cases to address the validity of VAWA's civil rights provision under the Commerce Clause. This Note clarifies the criteria the Supreme Court has used to determine the constitutionality of legislative action under the Commerce Clause, and demonstrates how the 1994 Violence Against Women Act is sufficiently tied to interstate commerce under those criteria. This Note concludes by suggesting that the Supreme Court likely would uphold the constitutionality of the civil rights provision of VAWA.

I. THE HISTORY OF THE COMMERCE CLAUSE: DEFINING INTERSTATE COMMERCE FROM *GIBBONS* TO *LOPEZ*

A. *Laying the Groundwork for Judicial Interpretation*

When drafting the United States Constitution, the founding fathers envisioned a national government possessing distinct powers separate from those of the states.⁴⁴ Accordingly, the founding fathers' plan for a new nation allocated power between the individual states and the federal government.⁴⁵ Among the enumerated powers granted to Congress in

Dec. 23, 1997).

42. See *id.* at 792-93, 801.

43. See *Brzonkala v. Virginia Polytechnic & State Univ.*, No. 96-2316, 1997 WL 785529, at *26 (4th Cir. Dec. 23, 1997).

44. See *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991) (discussing the fundamental constitutional principle of dual sovereignty); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (recognizing the balancing of federal and state powers as a protection of the peoples' "fundamental liberties"); THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961) (discussing the limited and defined powers of the federal government under the Constitution); *TRIBE*, *supra* note 4, § 5-20, at 302-03 (discussing the dual sovereignty of federal and state governments under the Constitution and the Supreme Court's interpretation of this constitutional doctrine); Corwin, *supra* note 5, at 482 (acknowledging that the existence of separate state powers, by definition, limits national power); Robert L. Stern, *That Commerce Which Concerns More States Than One*, 47 HARV. L. REV. 1335, 1340 (1934) (discussing the universal acceptance of the concept of separation of federal and state powers at the Constitutional Convention).

45. See U.S. CONST. amend. X; *supra* note 16 (for the text of the Tenth Amendment); see also John P. Roche, *The Founding Fathers: A Reform Caucus in Action*, AM. POL. SCI.

the Constitution was the power to regulate commerce among the several states.⁴⁶ The scope of the commerce power, however, remained untested and uncertain until the landmark decision of Chief Justice John Marshall in *Gibbons v. Ogden*.⁴⁷

In *Gibbons*, the Court questioned whether New York State could grant one of its citizens the exclusive right to navigate steamboats between New York and New Jersey in the face of a federal law licensing

REV. (Dec. 1961), reprinted in PETER WOLL, *AMERICAN GOVERNMENT: READING AND CASES* 11-28 (9th ed. 1987) (addressing the different positions toward federalism debated at the Constitutional Convention); Stern, *supra* note 44, at 1338 (noting that despite criticism of the broad standard proposed for division of power between individual states and the federal government, the Constitutional Convention approved the proposal). The concept of "dual federalism" encompasses the idea that both the federal and state governments could act to complement the other's regulatory duties. See Cirillo & Eisenhofer, *supra* note 2, at 910 (questioning "whether state power could be exercised in the absence of congressional activity"). See generally Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (discussing the concept of dual federalism).

46. See U.S. CONST. art. I, § 8, cl. 3; *supra* note 2 (for the text of the Commerce Clause). The founding fathers had overlooked commerce when establishing a government under the Articles of Confederation because up until that time, the colonies had suffered "no significant commercial problems." See 1 ROTUNDA & NOWAK, *supra* note 5, § 4.3, at 368. At the time of the Articles of Confederation, states elected to have the individual power to regulate commerce because they feared discrimination by other states with conflicting commercial interests. See *id.* The Articles of Confederation provided that "[t]he [U]nited [S]tates in [C]ongress assembled shall also have the sole and exclusive right and power of . . . regulating the trade and manageing [sic] all affairs with the Indians, not members of any of the states." U.S. ARTICLES OF CONFEDERATION, art. IX. Rather than promote commerce, the absence of centralized control hindered trade relations between the states and foreign nations. See 1 ROTUNDA & NOWAK, *supra* note 5, § 4.3, at 368-69; see also ANDREW C. McLAUGHLIN, *A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1935), reprinted in *ESSAYS ON THE MAKING OF THE CONSTITUTION* 54-55 (Leonard W. Levy ed., 2d ed. 1987) (noting that the status of commerce between the states under the Articles of Confederation demonstrated the need for a competent, centralized government); JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 144 (2d ed. 1983) (asserting that the lack of a centralized federal commerce power led to "economic chaos"); 2 STORY, *supra* note 3, § 1062, at 512 (noting that without the power to regulate among the states, the power to regulate foreign commerce would be "incomplete and ineffectual"). Instead of promoting unity, the lack of a national authority to regulate commerce caused states to be self-serving and narrow-minded. See 1 ROTUNDA & NOWAK, *supra* note 5, § 4.3, at 368-69 (discussing commercial relations between the states under the Articles of Confederation). When planning began for the 1787 Constitutional Convention in Philadelphia, commerce topped the list of areas needing federal guidance. See *id.* § 4.3, at 369 (noting that the founding fathers recognized the need for revision of the Articles of Confederation to address multistate problems). Indeed, Congress's grant of power to regulate commerce among the states received little or no opposition at the Constitutional Convention. See 2 STORY, *supra* note 3, § 1055, at 505.

47. 22 U.S. (9 Wheat.) 1 (1824). Until *Gibbons*, Congress made little substantive use of its commerce power. See Robert L. Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 645 (1946) (noting "little demand" by citizens for governmental intrusion into commercial affairs).

shipping on that same waterway.⁴⁸ The *Gibbons* Court broadly interpreted commerce to include the power to create the laws by which commerce should be governed.⁴⁹ Chief Justice Marshall refused to limit the definition of commerce to sales and trade, instead extending it to include navigation, transportation, and anything falling under the definition of "intercourse."⁵⁰ The Court emphasized that Congress's power to regulate encompassed commerce affecting the several states but not commerce occurring within one state.⁵¹ For nearly a century after *Gibbons*, Commerce Clause jurisprudence focused not on proactive uses of the commerce power,⁵² but rather on limiting state legislation that discriminated against interstate commerce.⁵³

B. Turning the Tide in Favor of Regulation

In the 1880s, following the adoption of the Interstate Commerce Act,⁵⁴ attitudes surrounding the scope of the government's power began to

48. See *Gibbons*, 22 U.S. (9 Wheat.) at 2-3.

49. See *id.* at 196 (prescribing that Congress's power to regulate commerce includes creating the rules by which to regulate); see also 1 ROTUNDA & NOWAK, *supra* note 5, § 4.1, at 371-72 (discussing Chief Justice Marshall's broad reading of Congress's commerce power).

50. See *Gibbons*, 22 U.S. (9 Wheat.) at 189-90. The Court found that the navigable waters between New York and New Jersey were part of the "high seas" and thus controlled by the nation, not the individual states. See *id.* at 22.

51. See *id.* at 194-95 (commenting that the federal power to regulate intrastate commerce would be "inconvenient" and "unnecessary"); see also *Veazie v. Moor*, 55 U.S. (14 How.) 568, 573-74 (1852) (affirming the inapplicability of the Commerce Clause to activities of citizens occurring entirely within one state).

52. See Stern, *supra* note 47, at 645-47. During this century of economic growth, citizens were content to live without the intrusion of government into the details of everyday life. See *id.* at 645. As a result, Congress made little use of its authority to regulate commerce or any of its other powers under the Constitution. See *id.* But once the economy and individual livelihoods began to suffer, after a rapid progression toward "unrestrained freedom of enterprise," citizens turned toward Congress to integrate the national economy and remedy the economic problems. See *id.*

53. See *Kidd v. Pearson*, 128 U.S. 1, 21-22 (1888) (inquiring whether a state ban on the manufacturing of liquor shipped out of state would interfere with Congress's authority to regulate interstate commerce); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 565 (1870) (holding that Congress could regulate a steamship which transported goods for sale or trade in other states as an "instrument" of commerce, even though the ship operated solely within the waters of one state); *Veazie*, 55 U.S. (14 How.) at 573-75 (holding that state regulation of steamboats did not violate the Commerce Clause so long as the commerce remained within the state); see also TRIIBE, *supra* note 4, § 5-4, at 306 (describing Commerce Clause jurisprudence during this time as rarely involving the review of congressional legislation).

54. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.

change.⁵⁵ A series of congressional enactments⁵⁶ forced the Court to de-emphasize interpretations involving state action and to focus instead on congressional exercises of power.⁵⁷ When first confronted with cases arising under the new legislation, the Court adhered to established principles, holding that activities such as manufacturing and production did not fall within the scope of the Commerce Clause.⁵⁸ As industry and transportation developed nationwide,⁵⁹ the Court continued to address federal and state legislative conflicts with increasing frequency, devel-

55. See *Ashton v. Cameron County Water Improvement Dist. No. One*, 298 U.S. 513, 531 (1936) (recognizing state sovereignty as essential and independent from federal legislation); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330, 362 (1935) (invalidating the Railroad Retirement Act of 1934 because the Act did not regulate commercial activity that could be characterized as interstate); *In re Heff*, 197 U.S. 488, 508-09 (1905) (supporting the concept that general police powers remain with the individual states), *overruled in part by* *United States v. Nice*, 241 U.S. 591 (1916); see also *TRIBE*, *supra* note 4, § 5-4, at 307-08 (noting that between 1887 and 1937 the Supreme Court restricted the scope of commerce regulation falling outside certain formalistic classifications). *But cf.* Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1410 (1987) (outlining a gradual expansion of commerce power from 1887 until the New Deal legislation, while admitting that certain economic activities remained outside Congress's commerce power).

56. See, e.g., Pure Food and Drugs Act of 1906, ch. 3915, 34 Stat. 768; Anti-Lottery Act of 1890, ch. 908, 26 Stat. 465; Sherman Antitrust Act of 1890, ch. 647, 26 Stat. 209 (codified as amended at 15 U.S.C. § 1884).

57. See *Wickard v. Filburn*, 317 U.S. 111, 121-25 (1942) (noting that Commerce Clause jurisprudence, prior to the Court's decision in *Wickard*, primarily addressed state-sanctioned activities).

58. See *Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (invalidating a federal regulation involving employee hours and wages by holding that the regulations constituted production, not commerce); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (refusing to apply the Sherman Antitrust Act to a sugar manufacturing monopoly because manufacturing was tied insufficiently to interstate commerce); see also *Cirillo & Eisenhofer*, *supra* note 2, at 910 n.66 (commenting that distinguishing commerce from certain activities, such as manufacturing and production, allowed Congress to regulate without offending the police power of the states); Robert Wax, Comment, *United States v. Lopez: The Continued Ambiguity of Commerce Clause Jurisprudence*, 69 TEMP. L. REV. 275, 279 nn.36-37 (1996) (describing that it was not the intent of the manufacturer, but rather, the actual realization of such intent that determined whether Congress could regulate a product as affecting interstate commerce). Despite the increase in congressional enactments, the Court continued to address conflicts existing between state legislation and the federal commerce power. See *Anderson v. United States*, 171 U.S. 604, 620 (1898) (holding valid the existence of a livestock exchange due to its remote effect on interstate commerce); *Hopkins v. United States*, 171 U.S. 578, 589-90 (1898) (finding that interstate commerce was unaffected despite one-half of a stockyard being in Kansas and the other half in Missouri); *Kidd v. Pearson*, 128 U.S. 1, 20-22 (1888) (upholding an Iowa statute that prohibited the manufacture of alcohol by distinguishing manufacturing from commerce).

59. See GERALD GUNTHER, CONSTITUTIONAL LAW 98 (12th ed. 1991) (discussing the development of industry and the increase in economic concerns of citizens and Congress).

oping a gradual willingness to expand the scope of the commerce power.⁶⁰ The Court specifically addressed congressional legislation in two distinct areas: economic regulation and police power regulation.⁶¹

1. Economic Regulation

The Court addressed the constitutionality of legislation concerning economic regulation in *United States v. E.C. Knight Co.*⁶² In *E.C. Knight*, the federal government claimed that several major sugar refineries violated the Sherman Antitrust Act.⁶³ The government argued that Congress could regulate the type of monopolies that existed in the sugar refining industry because refined sugar products, such as molasses and syrup, eventually entered into the stream of interstate commerce.⁶⁴ The Court disagreed, holding that because no direct link existed between manufacturing and commerce, Congress could not regulate the monopolies through its commerce power.⁶⁵ The mere manufacture of a product intended for use in interstate markets did not subject the manufacturing to regulation under the Commerce Clause.⁶⁶ The Court refused to accept the notion that indirect effects on interstate trade or commerce justified federal regulation.⁶⁷

60. See, e.g., *Baltimore & Ohio R.R. Co. v. ICC*, 221 U.S. 612, 618-19 (1911) (extending Congress's power to regulate the transportation of goods intended for both intra-state and interstate commerce); *St. Louis, Iron Mountain & S. Ry. Co. v. Taylor*, 210 U.S. 281, 287 (1908) (holding that promulgating railroad regulations under the commerce power was not an unconstitutional delegation of legislative power); *Johnson v. Southern Pac. Co.*, 196 U.S. 1, 22 (1904) (holding that an instrument which has stopped temporarily, but is regularly used in interstate commerce is still in interstate commerce). But see *Adair v. United States*, 208 U.S. 161, 179 (1908) (finding no connection between interstate commerce and membership in a labor organization).

61. See 1 ROTUNDA & NOWAK, *supra* note 5, § 4.5, at 378-79 (discussing the development of both economic and general police power regulation under the Commerce Clause).

62. 156 U.S. 1 (1895).

63. See *id.* at 2-3.

64. See *id.* at 13. The government argued that the enjoyment of sugar products was such a "necessary of life" for the majority of the population that the interstate sale and trade of such goods was "indispensable." *Id.* at 12.

65. See *id.* at 17.

66. See *id.* at 12. The Court listed certain activities that might indirectly affect interstate commerce such as contracts or conspiracies to control agriculture, mining, production, or the raising or lowering of wages. See *id.* at 16. The Court remained unwilling to extend Congress's regulatory power, without proof indicating it should do otherwise, because the sugar refineries did not intend to restrain interstate trade. See *id.* at 17.

67. See *id.* In holding as it did, the Court afforded great deference to state power by distinguishing between the original powers of the states and those allocated to Congress through the Constitution. See *id.* at 11. The Court mentioned that the relief to state citizens from damage by a monopoly should be granted by the individual state and not the

Not long after the decision in *E.C. Knight*, the Court modified its approach to congressional legislation concerning commerce. In *Houston, East & West Texas Railway Co. v. United States* (the *Shreveport Rate Case*),⁶⁸ the Interstate Commerce Commission (ICC) issued an order regulating shipping rates for train hauls completely within Texas state lines.⁶⁹ Because the rates for shipping between Shreveport, Louisiana and destinations in Texas were unreasonably higher than the rates for shipments solely within Texas, the ICC established maximum rates for shipping between these destinations.⁷⁰ The ICC claimed that because shippers competed for transportation along the same routes, state railroad authorities should be prohibited from intentionally setting rates higher for shipping between Shreveport and Texas than the rates established for shipping the same distance within Texas.⁷¹ The Court upheld the ICC regulation and ordered that Texas railroads cease the discriminatory practice of setting rates on interstate shipments higher than those on intrastate shipments.⁷² The Court found that although the ICC order specifically regulated intrastate activity, the activity's "substantial relation" to interstate commerce triggered Congress's regulatory authority.⁷³ Thus, the Court in the *Shreveport Rate Case*, unlike in *E.C. Knight*, found an intrastate activity within congressional control because the ultimate result of the activity affected interstate commerce.⁷⁴

federal government. *See id.* The Court concluded that if congressional regulatory power extended to all activities "whose ultimate result may affect external commerce," very few activities would remain under state control. *Id.* at 16; *see supra* note 45 (discussing the concept of dual federalism).

68. 234 U.S. 342 (1914).

69. *See id.* at 345.

70. *See id.* at 346.

71. *See id.* at 346-47. The ICC argued that charging higher rates for shipments between Shreveport and Texas discriminated against shipments to Louisiana in favor of shipments within Texas. *See id.* at 345.

72. *See id.* at 360. The Court first addressed the issue of interstate railroad fares in *Wabash, St. Louis & Pacific Railway v. Illinois*, 118 U.S. 557 (1886). With facts similar to those in the *Shreveport Rate Case*, the *Wabash* Court prohibited state governments from regulating railroad fares on trains that originated in one state and ended in another. *See Wabash*, 118 U.S. at 577. Congress specifically passed the Interstate Commerce Act of 1887 to end this type of pricing discrimination. *See* Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379, 379; Epstein, *supra* note 55, at 1413-14 (discussing the public and legislative concerns surrounding the promulgation of the Interstate Commerce Act).

73. *See The Shreveport Rate Case*, 234 U.S. at 351 (affirming Congress's power to insure the safety and efficiency of interstate commerce through regulation).

74. *See id.* The Court further held that regulation was necessary under the Commerce Clause in order for Congress to implement other interstate regulations effectively. *See id.*; *see also* Wax, *supra* note 58, at 280 (discussing the Court's decision to permit the ICC to regulate railroad rates in order to maintain fair competition between interstate and intrastate railroads).

Despite its decision in the *Shreveport Rate Case*, the Court refused to limit itself to applying only the newly created "substantial relation" or "substantially affect" test when addressing commerce issues.⁷⁵ Instead, Justice Holmes chose to create yet another method to determine the applicability of the commerce power in *Swift & Co. v. United States*.⁷⁶ In *Swift*, the Court upheld the regulation of price fixing within a stockyard even though the stockyard conducted activities solely within one state.⁷⁷ Writing for the Court, Justice Holmes found the congressional regulation constitutional because it fell within the "current of commerce."⁷⁸ As defined by the Court, this new test encompassed those activities that began in one state and were expected to conclude in another.⁷⁹ Thus, the actual interstate transaction itself became a part of commerce and fell under the commerce power.⁸⁰

2. Police Power Regulation

Although the commerce power clearly applied to those activities economic in nature, the relationship between commerce and non-economic activities remained tenuous.⁸¹ The Court struggled to establish guidelines for determining the minimum level of connection required between an activity and interstate commerce to invoke the commerce power.⁸² In or-

75. See *Swift & Co. v. United States*, 196 U.S. 375, 399 (1905) (establishing a "current of commerce" theory).

76. 196 U.S. 375 (1905).

77. See *id.* at 396-97, 399.

78. *Id.* at 399.

79. See *id.* at 398-99. The Court explained that when cattle are raised and reared in one state for eventual sale in another state, a common industry practice, the overall current of commerce is affected. See *id.* The Court found that the effects of monopolies on interstate commerce were not "accidental, secondary, remote or merely probable." *Id.* at 397.

80. See *id.* at 398-99.

81. See *Hammer v. Dagenhart* (the *Child Labor Case*), 247 U.S. 251, 276-77 (1918) (refusing to extend Congress's commerce power to the regulation of goods manufactured by children), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

82. See *Industrial Ass'n of San Francisco v. United States*, 268 U.S. 64, 82 (1925) (upholding the existence of a builders' exchange under the Sherman Antitrust Act). As in *E.C. Knight*, the Court looked to the intent of those who established the builders exchange when determining how the exchange affected interstate commerce. See *id.* The Court upheld the existence of the exchange because the builders did not intend for the exchange to affect interstate commerce. See *id.* In later years, intent became irrelevant in the Court's decisions concerning the regulation of interstate commerce. See *United States v. Darby*, 312 U.S. 100, 115 (1941) (deemphasizing the consideration of congressional motive or intent as part of Commerce Clause decisions); *The Child Labor Case*, 247 U.S. at 277-78 (Holmes, J., dissenting) (arguing that the intent of the legislature is irrelevant when regulating child labor as long as the labor affected interstate commerce).

der to address public welfare concerns that Congress could not directly regulate, the Court began to allow Congress to use its police power to prohibit the transportation of certain goods in order to protect public welfare. The Court used this technique to uphold Congress's exercise of such moral regulation in *Champion v. Ames* (the *Lottery Case*).⁸³ In the *Lottery Case*, the Court upheld the federal Anti-Lottery Act⁸⁴ which prohibited the interstate shipment of lottery tickets, specifically in Texas and California.⁸⁵ Although the Act did not regulate the sale or transportation of tickets within a state, the Court recognized Congress's clear intention to discourage gambling by passing the Act.⁸⁶ The *Lottery Case* established Congress's ability to regulate interstate activities harmful to the public good by prohibiting the transportation of harmful items.⁸⁷ After the *Lottery Case*, the Court upheld other "police power" regulations in the areas of pure food and drugs, obscenity, white slave traffic, and diseased plants or animals.⁸⁸

83. 188 U.S. 321 (1903).

84. Ch. 908, 26 Stat. 465 (1890).

85. See *The Lottery Case*, 188 U.S. at 363-64.

86. See *id.* at 356. Earlier in *Phalen v. Virginia*, the Court commented on an apparent distaste for gambling and betting, finding that lotteries brought decay and unproductivity to entire communities and "prey[ed] upon the hard earnings of the poor." 49 U.S. (8 How.) 163, 168 (1850).

87. See *The Lottery Case*, 188 U.S. at 363.

88. See, e.g., *Hoke v. United States*, 227 U.S. 308, 322 (1913) (upholding the Mann Act, which prohibited the interstate movement of prostitutes); *Hipolite Egg Co. v. United States*, 220 U.S. 45, 58, 60 (1911) (authorizing the seizure of impure eggs transported interstate under the Pure Food and Drugs Act of 1906); *United States v. Popper*, 98 F. 423, 424 (N.D. Cal. 1899) (regulating the interstate shipment of birth control devices). The Court's concern over issues of public morals included employee-employer relationships. See generally *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (discussing the regulation of worker hours and wages in coal mines); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) (addressing the establishment of fair labor wages and hours nationwide); *Hammer v. Dagenhart* (the *Child Labor Case*), 247 U.S. 251 (1918) (dealing with the federal regulation of child labor), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

In the *Child Labor Case*, the Court struck down a federal statute prohibiting the interstate shipment of goods manufactured by children under sixteen-years old and under certain working conditions. See 247 U.S. at 269, 277. The Court reasoned that because the manufactured goods themselves were harmless and it was actually the employment of underage children that was unlawful, interstate commerce was not affected. See *id.* at 271-72. In a striking dissent, however, Justice Holmes argued that as long as Congress could constitutionally regulate the interstate shipment of the goods, the intent of the legislature did not matter. See *id.* at 277-78 (Holmes, J., dissenting). Justice Holmes's dissent in the *Child Labor Case* later was adopted unanimously as the majority opinion by the Court in *United States v. Darby*, 312 U.S. 100 (1941). See *infra* notes 104-14 and accompanying text (discussing the *Darby* opinion); see also Robert Eugene Cushman, *The National Police Power Under The Commerce Clause Of The Constitution*, 3 MINN. L. REV. 289, 381-412 (1919) (discussing congressional regulations and police power); Thomas Reed Powell, *The*

C. *The New Deal: Laying a Foundation for Modern
Commerce Clause Analysis*

By the time of the New Deal in 1933, analysis of Commerce Clause cases continued to vacillate between varying standards of review and methods of analysis.⁸⁹ Determined to establish one recognized standard of review and provide for stability in commerce power analysis, the Supreme Court once again set out to distinguish between direct and indirect effects on commerce.⁹⁰ In *A.L.A. Schechter Poultry Corp. v. United States*,⁹¹ the government charged Schechter Poultry Corp. with violating minimum wage and hour provisions established by the State of New York.⁹² Although the Schechter corporation operated solely within New York, the government argued that the company's actions "affected" interstate commerce.⁹³ In an attempt to resolve any confusion between the two tests, the *Schechter* Court held that if an intrastate activity directly affected interstate commerce, Congress could regulate the activity; but if the activity only indirectly affected interstate commerce, Congress could not regulate the activity under the Commerce Clause.⁹⁴ While making this seemingly simple distinction, the Court characterized the level of effect of intrastate activity on interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system."⁹⁵

Child Labor Law, The Tenth Amendment, and the Commerce Clause, 3 S. L.Q. 175, 202 (1918) (arguing that the Court's reasoning in the *Child Labor Case* was flawed).

89. See *Houston, E. & W. Tex. Ry. Co. v. United States* (the *Shreveport Rate Case*), 234 U.S. 342, 358-60 (1914) (discussing the "substantially affects" test). But see *Swift & Co. v. United States*, 196 U.S. 375, 396-99 (1905) (discussing the "current of commerce" theory).

90. See *Schechter*, 295 U.S. at 546. Although the *Schechter* opinion was one of the first to stress the distinction between direct and indirect effects on commerce, other decisions employed a similar line of analysis. See *Baltimore & Ohio R.R. Co. v. ICC*, 221 U.S. 612, 619 (1911) (finding a "direct relation" between employee work hours and general health and human welfare); *Adair v. United States*, 208 U.S. 161, 178 (1908) (requiring Congress to find a "substantial relation" to the commerce it intended to regulate without using the terms "direct" and "indirect"), *overruled in part by Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); see also D.J. Farage, *That Which "Directly" Affects Interstate Commerce*, 42 DICK. L. REV. 1, 10 (1937) (describing how a cause and effect analysis often is triggered when analyzing "directness").

91. 295 U.S. 495 (1935).

92. See *id.* at 519.

93. See *id.* at 546.

94. See *id.* at 547 (discussing whether the intent behind the intrastate activity was directed toward affecting interstate commerce); see also Farage, *supra* note 90, at 3 (discussing the difference between direct and indirect effects on interstate commerce). Farage interpreted *Schechter* to define "direct" as those statutes which clearly discriminate against commerce. See Farage, *supra* note 90, at 3. According to Farage, "indirect" included those statutes which are non-discriminatory toward commerce. See *id.*

95. *Schechter*, 295 U.S. at 548.

Two years later, however, in *NLRB v. Jones & Laughlin Steel Corp.*,⁹⁶ the Court departed from the distinction between direct and indirect effects established in *Schechter*⁹⁷ by creating a new test for determining whether an activity could be regulated under the commerce power.⁹⁸ If a regulated activity substantially affected commerce among the states, the regulation would be upheld under the federal commerce power, regardless of the intent of the regulation.⁹⁹ Thus, the same Court that decided *Schechter* upheld this exercise of the commerce power and ordered Jones & Laughlin Steel to rehire employees¹⁰⁰ discharged in violation of the National Labor Relations Act of 1935 (NLRA).¹⁰¹ Departing from its earlier decisions that had excluded manufacturing and production from commerce,¹⁰² the Court recognized that manufacturing played a vital role in the company's operations and that any significant effect on manufacturing might prove "catastrophic" to interstate commerce.¹⁰³

96. 301 U.S. 1 (1937).

97. *See id.* at 31 (dismissing the *Schechter* test while allowing for federal regulation of actions having a direct burden on interstate activity).

98. *See id.* at 37.

99. *See id.* at 30-32, 37-38. Jones & Laughlin operated its business activities in several different states. *See id.* at 26. For example, mining occurred in one state, manufacturing in another, and shipping throughout the Great Lakes region. *See id.* Thus, while the regulation might have been intended to affect only activities in one state, the activity within that state necessarily affected operations in the other states because of the structure of the corporation. *See id.* at 37-38.

100. *See id.* at 48-49 (requiring the reinstatement of fired employees as a remedy for violation of the National Labor Relations Act of 1935).

101. Ch. 372, 49 Stat. 449 (codified as amended at 29 U.S.C. § 151 (1994)).

102. *See Carter v. Carter Coal Co.*, 298 U.S. 238, 304 (1936) (holding that manufacturing and production do not affect commerce); *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (same); *Kidd v. Pearson*, 128 U.S. 1, 20-22 (1888) (same).

103. *See Jones & Laughlin*, 301 U.S. at 41. Abandoning Justice Holmes's "current of commerce" theory, the Court refused to make distinctions as to where in the manufacturing or shipping process regulation occurred. *See id.* at 36. As long as a regulated activity substantially affected interstate commerce, the regulation was constitutional. *See id.* at 36-37, 49. Decided at the same time as *Jones & Laughlin*, *NLRB v. Friedman-Harry Marks Clothing Co.* held that regulations established under the NLRA applied to a men's clothing manufacturer who produced only one-half of one percent of all men's clothing manufactured nationwide. *See* 301 U.S. 58, 72-75 (1937). The Court agreed with the findings of the National Labor Relations Board, reasoning that the raw materials to make the clothing and the finished products shipped out of state substantially contributed to interstate commerce. *See id.* at 73, 75; *see also NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224, 225-27 (1963) (applying the NLRA to a New York oil distributor on the basis that any problems during the course of shipping the oil from other states into New York would tend to affect interstate commerce); *NLRB v. Fainblatt*, 306 U.S. 601, 606-09 (1939) (holding that regulations under the NLRA applied to a New Jersey clothing shop, regardless of the amount of goods the shop contributed to interstate commerce). Therefore, the distinction became irrelevant as to whether the regulation affected the manufacturing plant, the

The watershed decision in *Jones & Laughlin* paved the way for further expansion of the Commerce Clause.¹⁰⁴ In *United States v. Darby*,¹⁰⁵ the Court entertained a challenge to the constitutionality of the Fair Labor Standards Act of 1938¹⁰⁶ as applied to the regulation of lumber.¹⁰⁷ The Act prohibited the placement into interstate commerce of any goods manufactured or produced in violation of certain national wage and hour standards.¹⁰⁸ The Court upheld Congress's use of the commerce power to enact this legislation.¹⁰⁹ In so holding, the *Darby* Court declined to consider congressional motive or intent in passing the legislation.¹¹⁰ Instead, the Court looked only to whether the regulation of commerce was within the plenary powers of Congress as conferred by the Constitution.¹¹¹ Furthermore, the *Darby* Court upheld part of the Act that criminalized any violation of the wage and hour regulations.¹¹² In so doing, *Darby* established that any regulation enacted by Congress must provide a reasonable means to achieve a legitimate end in order to satisfy the Commerce Clause.¹¹³ The Court stated that once Congress could constitutionally regulate, it could adopt any reasonable means by which to do so.¹¹⁴

channels of transportation, or the final destination of the products for sale. Cf. *Friedman-Harry Marks*, 301 U.S. at 72-75 (focusing on the fact that the regulated activity substantially affected interstate commerce and not whether the activity was of one particular type); *Jones & Laughlin*, 301 U.S. at 36-37 (same).

104. See *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (rejecting the argument that activities with a trivial effect on interstate commerce should be excluded from regulation under the Commerce Clause); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942) (extending the commerce power to include intrastate activities that substantially interfere with or obstruct congressional exercise of the commerce power); *United States v. Darby*, 312 U.S. 100, 115 (1941) (upholding the regulation of employee hours and wages because the manufactured products flowed into the stream of interstate commerce); *Virginian Ry. Co. v. System Federation No. 40*, 300 U.S. 515, 552 (1937) (focusing on the potential magnitude of the disruption of commerce from labor-management conflicts, rather than on the manner of the regulation).

105. 312 U.S. 100 (1941).

106. Ch. 676, 52 Stat. 1060 (1938).

107. See *Darby*, 312 U.S. at 108.

108. See *id.* at 109. The Act established minimum wages and maximum work hours for employees engaged in the manufacture of goods intended for interstate commerce. See *id.*

109. See *id.* at 115.

110. See *id.*

111. See *id.* The Court held that the motive and purpose of legislation were, "legislative judgment[s] upon the exercise of which the Constitution places no restriction and over which the courts are given no control." *Id.* The *Darby* Court did note, however, that the purpose of the Act was to prevent the production of goods under circumstances detrimental to employee health. See *id.* at 109.

112. See *id.* at 123.

113. See *id.* at 121.

114. See *id.* Once Congress could legitimately enact legislation, the Court stated that Congress, "may choose the means reasonably adapted to the attainment of the permitted

Shortly after the decision in *Darby*, the Court held in *Wickard v. Filburn*¹¹⁵ that Congress could regulate not only those activities which by themselves substantially affected interstate commerce, but also those activities which, as a class, could produce that same effect.¹¹⁶ The *Wickard* Court addressed the constitutionality of the Agricultural Adjustment Act of 1938,¹¹⁷ which permitted the Secretary of Agriculture to regulate the volume of wheat harvested by individual farmers.¹¹⁸ Mr. Filburn, an Ohio wheat farmer, challenged the Act, claiming that raising and consuming wheat on his own farm constituted a local activity, not interstate commerce.¹¹⁹ Although Mr. Filburn's farming activities produced wheat for personal consumption, the Court upheld the Act and its power to set farming quotas.¹²⁰ The *Wickard* Court noted that the wheat grown by Mr. Filburn, coupled with similar behavior by other farmers, would create a cumulative effect on interstate commerce, and was therefore appropriate for Congress to regulate under its commerce power.¹²¹ The Court again rejected the distinction between direct and indirect effects, expanding the commerce power by holding that if an activity had a substantial economic effect on interstate commerce, Congress could regulate the activity under the Commerce Clause, regardless of whether the effect was the result of the cumulative activities of several economic actors.¹²²

This trio of cases introduced a new era of Commerce Clause jurisprudence.¹²³ While earlier cases limited the power of Congress to regulate interstate commerce, these cases expanded the commerce power.¹²⁴

end," even if the means adapted involved the regulation of some aspect of intrastate commerce. *Id.*

115. 317 U.S. 111 (1942).

116. *See id.* at 128-29.

117. Ch. 30, 52 Stat. 31 (codified as amended at 7 U.S.C. §§ 1281-1393 (1994)).

118. *See Wickard*, 317 U.S. at 128-29.

119. *See id.* at 118-19.

120. *See id.* at 128-29.

121. *See id.* The Court found that if a person could grow freely as much wheat as desired for personal consumption, the demand on the overall market for wheat would lessen. *See id.* at 127-28. Thus, while the effect on interstate commerce of one farmer's home consumption of wheat may appear insignificant, home consumption by several farmers may decrease the demand for wheat, affecting interstate commerce. *See id.* The Court stated, "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce." *Id.* at 125.

122. *See id.* at 128-29; *see also* *Fry v. United States*, 421 U.S. 542, 547 (1975) (acknowledging that the cumulative effect of wage increases in Ohio would affect interstate commerce).

123. *See* *United States v. Lopez*, 514 U.S. 549, 556 (1995) (noting that these three cases greatly expanded Congress's Commerce Clause authority).

124. *See id.*; *Wickard*, 317 U.S. at 128-29 (permitting Congress to use the Commerce

Through the end of the 1940s, the Court continued to uphold broad exercises of Congress's commerce power and lay the foundation for modern Commerce Clause analysis.¹²⁵

D. Extending the Commerce Clause to Control Social Conduct

As a result of American sentiment focusing on civil rights in the 1960s, Congress began to use the commerce power to regulate other activities, such as racial discrimination, because of their effect on interstate commerce.¹²⁶ In *Heart of Atlanta Motel, Inc. v. United States*,¹²⁷ a motel owner denied accommodations to black patrons in violation of the Civil Rights Act of 1964.¹²⁸ The owner claimed that the decision not to rent rooms to black customers had no effect on interstate commerce,¹²⁹ and that Congress exceeded its Commerce Clause authority by passing the Act.¹³⁰ The Court held otherwise, reasoning that under the specific circumstances of the case, including the fact that the location of the motel was less than a

Clause to regulate the production of wheat for home consumption); *United States v. Darby*, 312 U.S. 100, 115 (1941) (allowing regulation of hours and wages through the commerce power because of a perceived effect on interstate commerce); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41 (1937) (upholding federal regulation of labor-management relations because of its potential effect on interstate commerce).

125. See *United States v. Women's Sportswear Mfrs. Ass'n*, 336 U.S. 460, 461-62 (1949) (upholding congressional regulation of the women's clothing industry in Massachusetts under the Sherman Act, despite the fact that 80% of the cloth used in the manufacturing process was from other states); *United States v. Rock Royal Coop.*, 307 U.S. 533, 569 (1939) (noting that interstate commerce often relies on the stability of intrastate commercial activities).

126. See *Katzenbach v. McClung*, 379 U.S. 294, 296, 304 (1964) (finding the commerce power applicable to the discriminatory practices of a restaurant serving food which had moved through the channels of interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 252-53, 258 (1964) (finding the commerce power applicable to the discriminatory practices of a hotel whose guests moved in interstate commerce); *Boynton v. Virginia*, 364 U.S. 454, 463-64 (1960) (finding that a bus station restaurant placed a burden on interstate commerce by maintaining segregated restaurant facilities). Congress shifted its focus in the area of civil rights to commerce during the 1950s and 1960s in an effort to ensure the civil rights of all Americans. See LEE EPSTEIN & THOMAS G. WALKER, *CONSTITUTIONAL LAW FOR A CHANGING AMERICA* 469 (1992). Although seminal cases such as *Brown v. Board of Education*, 347 U.S. 483 (1954), paved the way for equal treatment of citizens when the government involved itself in an activity or regulation, discrimination continued to thrive in the private sector during this time. See EPSTEIN & WALKER, *supra*, at 469. Congress passed the Civil Rights Act of 1964 under the federal commerce power in an attempt to eliminate discrimination in the private sector. See *id.*

127. 379 U.S. 241 (1964).

128. See *id.* at 243.

129. See *id.* at 243-44.

130. See *id.*

mile from an interstate highway, the owner's policy affected interstate commerce.¹³¹

The Court in *Katzenbach v. McClung*,¹³² decided the same day as *Heart of Atlanta*, considered another challenge to a different aspect of anti-race discrimination legislation.¹³³ In *Katzenbach*, a black man was denied service at Ollie's Barbeque, a restaurant located eleven blocks from an interstate highway in Alabama.¹³⁴ The Court upheld Congress's power to regulate the restaurant's activities because a substantial portion of the food served at the restaurant arrived through the channels of interstate commerce and because of the restaurant's proximity to the highway.¹³⁵ The Court found that while activities at the restaurant may have had only an incidental effect on interstate commerce, interstate commerce could be cumulatively affected by such practices.¹³⁶

Jointly, *Heart of Atlanta* and *Katzenbach* founded modern Commerce Clause analysis.¹³⁷ *Heart of Atlanta* established that Congress may regulate activities affecting interstate commerce if a rational basis existed to connect the activity to interstate commerce.¹³⁸ Further, the Court in *Katzenbach* held that where Congress had a rational basis for enacting a regulatory scheme, the Court's only role was to ensure the proper application of the regulations.¹³⁹ Using this analysis, the *Katzenbach* Court held that racial discrimination in restaurants had a direct and adverse effect on interstate commerce.¹⁴⁰ Following these decisions, the Court con-

131. See *id.* at 258. The Court held that by denying accommodations to blacks, the hotel's actions restricted their movement and freedom of travel. See *id.* at 252-53. Therefore, discouraging the interstate transportation of certain individuals clearly affected interstate commerce. See *id.*

132. 379 U.S. 294 (1964).

133. See *id.* at 296.

134. See *id.* at 296-97.

135. See *id.* at 296, 304. Almost half of the food served at Ollie's was purchased from a supplier who received his goods through out-of-state commerce. See *id.* at 296-97.

136. See *id.* at 304-05.

137. Cf. 1 ROTUNDA & NOWAK, *supra* note 5, § 4.10, at 412-13 (discussing the Court's validation in these cases of the Civil Rights Act of 1964). Prior to 1964, the Court had prohibited racial discrimination in the channels of interstate commerce. See *Henderson v. United States*, 339 U.S. 816, 824-26 (1950) (invalidating a railroad regulation limiting dining car services available to blacks but not to whites as violative of the Interstate Commerce Act); *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (invalidating a Virginia statute authorizing segregation on buses traveling interstate); *Mitchell v. United States*, 313 U.S. 80, 94-95, 97 (1941) (finding a railroad regulation imposing segregation on train sleeping cars violated the Interstate Commerce Act).

138. See *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258-59 (1964).

139. See *Katzenbach*, 379 U.S. at 304.

140. See *id.* The Court found that Congress, "in light of the facts and testimony before them, ha[d] a rational basis for finding a chosen regulatory scheme necessary to the pro-

tinued to uphold congressional use of the commerce power to regulate non-commercial activities.¹⁴¹ Areas such as land use¹⁴² and loan sharking¹⁴³ were found to be within the realm of protection of the Commerce Clause if Congress had a rational basis for enacting the legislation.

E. Ushering in a New Era: United States v. Lopez

In *United States v. Lopez*,¹⁴⁴ the Supreme Court decided the most significant Commerce Clause case in fifty years.¹⁴⁵ In *Lopez*, a high school

tection of commerce." *Id.* at 303-04.

141. The Court's decision in *National League of Cities v. Usery* proved to be the only anomaly during this time. See 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); see also 1 ROTUNDA & NOWAK, *supra* note 5, § 4.10, at 423 (discussing that in cases following the *National League of Cities* decision, the Court failed to hold that a federal law could not apply to state or local governments). In *National League of Cities*, the Court held that congressional regulation under amendments to the Fair Labor Standards Act exceeded Congress's commerce power. See 426 U.S. at 851-52. The original 1938 Act had been upheld under the commerce power in *United States v. Darby*, 312 U.S. 100, 114-15 (1941). The *National League of Cities* decision surprised many legal scholars because the Court had not invalidated a statute as an extension of the commerce power since the 1930s. See Sotirios A. Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment?*, 1976 SUP. CT. REV. 161, 161-64 (discussing the contentious nature of the *National League of Cities* decision); see also PHILIP BOBBIT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 191-94 (1982) (same); Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81-82 (same).

However, *Garcia* expressly overruled *National League of Cities* less than a decade later, and returned Commerce Clause jurisprudence to its earlier status. See *Garcia*, 469 U.S. at 531. *Garcia* questioned whether the same wage and hour regulations at issue in *National League of Cities* applied to mass-transit employees in a municipally owned and operated system. See *id.* at 530. The Court permitted the regulation to extend to the municipality, and noted that this extension would not impinge upon a state's rights because of the "internal safeguards" inherent in the federal system. *Id.* at 556.

142. See *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 281 (1981) (holding that congressional findings supporting legislative action withstood the rational basis test).

143. See *Perez v. United States*, 402 U.S. 146, 152-55 (1971) (upholding the congressional regulation of intrastate loan sharking transactions by linking the transactions to interstate organized crime).

144. 514 U.S. 549 (1995).

145. See Arkin, *supra* note 18, at 1569; Wax, *supra* note 58, at 286 (noting that the *Lopez* decision stopped the expansion of Congress's commerce power); Carlo D'Angelo, Note, *The Impact of United States v. Lopez Upon Selected Firearms Provisions of Title 18 U.S.C. § 922*, 8 ST. THOMAS L. REV. 571, 591 (1996) (commenting that *Lopez* marked the first time in over fifty years that the Court held that a federal law exceeded Congress's commerce power); Michael J. Trapp, Note, *A Small Step Towards Restoring the Balance of Federalism: A Limit to Federal Power Under the Commerce Clause*, 64 U. CIN. L. REV. 1471, 1492 (1996) (same); Dissinger, *supra* note 19, at 508 (same); Linda Greenhouse, *High Court Kills Law Banning Guns in a School Zone*, N.Y. TIMES, Apr. 27, 1995, at A1 (noting that *Lopez* "marked a sharp departure from the modern Supreme Court's expansive view of congressional power to regulate commerce"). Prior to *Lopez*, *Carter v. Carter*

student was convicted of unlawful possession of a firearm¹⁴⁶ under the Gun-Free School Zones Act of 1990.¹⁴⁷ The Act imposed criminal liability on anyone found to “knowingly possess a firearm” in a school zone.¹⁴⁸ Lopez appealed his conviction, arguing that the Act exceeded the scope of Congress’s commerce power.¹⁴⁹

The *Lopez* Court found that the activity in question fell within the category of regulation having a “substantial relation” to interstate commerce.¹⁵⁰ Prior to analyzing *Lopez* under this category, however, the Court held that once a rational basis could be established for enacting the regulation in question, the proper standard of review in such cases was whether an activity “substantially affects” interstate commerce.¹⁵¹ By using this standard, the *Lopez* Court refused to acquiesce to Congress’s expansion of its regulatory authority.¹⁵² The Court found that the connection between violence in schools and interstate commerce was too remote to fall within Congress’s commerce power.¹⁵³ Furthermore, the Court noted that to find a substantial connection to interstate commerce would open the floodgates to congressional regulation of all areas of life.¹⁵⁴

Despite this decision, many federal courts have upheld civil and criminal congressional enactments under the Commerce Clause by distin-

Coal Co. invalidated the Bituminous Coal Conservation Act of 1935 as exceeding Congress’s commerce power, and was the last case to overrule congressional commerce regulation. See 298 U.S. 238, 311 (1936); see also *Dissinger*, *supra* note 19, at 508 n.19. In *National League of Cities*, the Court invalidated a federal statute governing employee wages and hours. See 426 U.S. at 851-52. The Court overruled *National League of Cities* nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 531 (1985). See *supra* note 141 (discussing the *National League of Cities* and *Garcia* cases).

146. See *Lopez*, 514 U.S. at 552.

147. Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(2) (1994).

148. 18 U.S.C. § 922(q)(2)(A).

149. See *Lopez*, 514 U.S. at 552.

150. See *id.* at 559. See generally *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (discussing federal regulation of intrastate activities based on the activities’ “close and intimate relation to interstate commerce”).

151. See *Lopez*, 514 U.S. at 559. In other decisions, the Court held that the activity must only “affect” interstate commerce to be regulated by Congress under the Commerce Clause. See *Preseault v. ICC*, 494 U.S. 1, 17 (1990) (“[W]e must defer to a congressional finding that a regulated activity affects interstate commerce.”).

152. See *Lopez*, 514 U.S. at 559, 567-68.

153. See *id.* at 567-68. Writing for the majority, Chief Justice Rehnquist stated that, “[t]he possession of a gun in a local school zone is in no sense an economic activity that might . . . substantially affect any sort of interstate commerce.” *Id.* at 567.

154. See *id.* at 564. The Court opined that if it accepted the purported reasoning supporting the Act, “it [would be] difficult to perceive any limitation on federal power.” *Id.*

guishing them from *Lopez*.¹⁵⁵ Other federal courts, however, have chosen to follow *Lopez* and invalidate regulations not having a sufficient connection to interstate commerce.¹⁵⁶ The latest judicial challenge to the commerce power questions the constitutionality of the civil rights provision of the 1994 Violence Against Women Act.¹⁵⁷

II. QUESTIONING THE CONNECTION BETWEEN GENDER-BASED VIOLENCE AND INTERSTATE COMMERCE

Congress adopted the Violence Against Women Act in 1994 as Title IV of the Violent Crime Control and Law Enforcement Act.¹⁵⁸ The Act criminalizes interstate domestic violence and provides a civil remedy for those injured under the Act.¹⁵⁹ The civil rights provision states that travel

155. See, e.g., *Brzonkala v. Virginia Polytechnic & State Univ.*, No. 96-2316, 1997 WL 785529, at *26 (4th Cir. Dec. 23, 1997) (upholding the civil rights provision of VAWA as constitutional under the Commerce Clause); *United States v. Soderna*, 82 F.3d 1370, 1379 (7th Cir.) (upholding the Freedom of Access to Clinic Entrances Act as a valid exercise of the commerce power), *cert. denied*, 117 S. Ct. 507 (1996); *United States v. Coleman*, 78 F.3d 154, 158 (5th Cir.) (upholding a federal anti-carjacking statute because auto theft has been rationally connected to interstate commerce), *cert. denied*, 117 S. Ct. 230 (1996); *United States v. Wilks*, 58 F.3d 1518, 1522 (10th Cir. 1995) (upholding a federal statute that makes the transfer and possession of machine guns a federal crime); *Doe v. Doe*, 929 F. Supp. 608, 615 (D. Conn. 1996) (distinguishing the *Lopez* decision and holding the 1994 Violence Against Women Act as a constitutional exercise of Congress's commerce power); *United States v. Collins*, 921 F. Supp. 1028, 1036-37 (W.D.N.Y. 1996) (authorizing the federal regulation of child support payments).

156. See *United States v. Denalli*, 73 F.3d 328, 330 (11th Cir. 1996) (per curiam) (endorsing the limited approach employed by *Lopez*); *United States v. Pappadopoulos*, 64 F.3d 522, 527-28 (9th Cir. 1995) (relying on *Lopez* to hold that there was no nexus between commerce and an activity when the activity had only a "remote and indirect effect on interstate commerce").

157. See 42 U.S.C. § 13981(b) (1994); see also *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 801 (W.D. Va. 1996) (invalidating the civil rights provision of VAWA as an improper exercise of Congress's commerce power), *rev'd*, No. 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997); *Doe*, 929 F. Supp. at 617 (upholding the civil rights provision of VAWA under the Commerce Clause).

158. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, tit. IV, 108 Stat. 1796 (codified as amended in scattered sections of 18 and 42 U.S.C.).

159. See 42 U.S.C. § 13981(c) (1994). The Act provides for a civil cause of action, and reads:

(c) Cause of action. A person . . . who commits a crime of violence motivated by gender and thus deprives another of the right declared in subsection (b) of this section shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate.

Id. The text of subsection (b) provides that:

(b) Right to be free from crimes of violence. All persons within the United States shall have the right to be free from crimes of violence motivated by gender (as defined in subsection (d) of this section).

across state lines with the intent to harm one's spouse or partner, or causing, by either duress or coercion, a spouse or partner to cross state lines under the fear of abuse, is a criminal offense and gives rise to a private cause of action.¹⁶⁰ The Act also provides \$1.6 billion in federal funds for spending over a six-year period to combat violence against women.¹⁶¹ Just two years after its enactment, two federal courts addressed the constitutionality of the civil rights provision of the 1994 Violence Against Women Act under Congress's commerce power.¹⁶²

A. *Doe v. Doe: In Praise of Congressional Intervention*

United States District Judge Janet Bond Arterton first addressed the constitutionality of the civil rights provision of VAWA in *Doe v. Doe*.¹⁶³ In *Doe*, a Connecticut woman sued her husband under the civil rights provision of VAWA¹⁶⁴ alleging that he had deprived her of her right to be free from gender-based violence.¹⁶⁵ In the civil suit, Jane Doe alleged

Id. § 13981(b); see *supra* note 32 (providing text of § 13981(d)(1)).

160. See 18 U.S.C. § 2261(a) (1994). The Act lists offenses as:

(1) Crossing a state line. A person who travels across a State line or enters or leaves Indian country with the intent to injure, harass, or intimidate that person's spouse or intimate partner, and who, . . . intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner, shall be punished as provided in subsection (b).

(2) Causing the crossing of a state line. A person who causes a spouse or intimate partner to cross a State line or to enter or leave Indian country by force, coercion, duress, or fraud and, in the course or as a result of that conduct, intentionally commits a crime of violence and thereby causes bodily injury to the person's spouse or intimate partner, shall be punished as provided in subsection (b).

Id.; see also *United States v. Bailey*, 112 F.3d 758, 766 (4th Cir. 1997) (upholding the validity of § 2261(a)).

161. See 42 U.S.C. §§ 3796gg to 3796gg-1 (1994). Congress allocated the funds for: (1) community support programs, 42 U.S.C. § 10418; (2) rape education and prevention, *id.* § 300w-10; and (3) temporary monetary relief for victims of domestic violence, *id.* § 10402(a)(1).

162. See *Brzonkala v. Virginia Polytechnic & State Univ.*, No. 96-2316, 1997 WL 785529, at *12 (4th Cir. Dec. 23, 1997), *rev'g* 935 F. Supp. 779 (W.D. Va. 1996); *Doe*, 929 F. Supp. at 610.

163. 929 F. Supp. 608 (D. Conn. 1996). Both the plaintiff and the defendant assumed pseudonyms for the purpose of the court proceedings. See *id.* at 610 n.1; see also Goldscheid & Kraham, *supra* note 30, at 514-15 (recognizing that despite the federal rule requiring the inclusion of the names of parties in pleadings, courts may allow parties to proceed under pseudonyms in sensitive cases).

164. See *supra* note 32 for the text of the civil rights provision.

165. See *Doe*, 929 F. Supp. at 610. This case marked the first suit by a wife against her husband under VAWA. See Mark Pazniokas, *Wife Files Suit for 'Gender Violence,'* HARTFORD COURANT, May 14, 1996, at A1, available in 1996 WL 4369235. Jane Doe sued for an unspecified amount of compensatory and punitive damages. See *id.*; see also RAQUEL KENNEDY BERGEN, *WIFE RAPE: UNDERSTANDING THE RESPONSE OF*

that her husband's continuous and systematic abuse over a seventeen-year period caused pain, suffering, and physical injuries.¹⁶⁶

In his defense, John Doe claimed that Congress lacked the authority to create this cause of action under the Commerce Clause.¹⁶⁷ First, he argued that *Lopez* overruled the rational basis test for determining whether congressional action could be upheld under the Commerce Clause.¹⁶⁸ Second, he contended that, if applicable, VAWA failed the rational basis test because gender-based violence was not sufficiently tied to interstate commerce.¹⁶⁹ Finally, the defendant argued that VAWA improperly federalized traditional areas of state control.¹⁷⁰ The court disagreed, holding that Congress acted within its authority in creating a federal cause of action for gender-based violence.¹⁷¹

1. *Maintaining a Rational Basis Test*

To determine the constitutionality of the civil rights provision of VAWA, the *Doe* court applied the two-prong rational basis test, asking whether there was a rational basis for congressional action and whether the means chosen were "reasonably adapted" to achieve the desired result.¹⁷² Though the court rejected the defendant's argument that *Lopez*

SURVIVORS AND SERVICE PROVIDERS 1-7 (1996) (providing an in-depth discussion of the history of "wife rape"); *Stopping Sexual Assault in Marriage: A Guide for Women, Counselors and Advocates* (Center for Constitutional Rights, New York, N.Y., 2d ed.), 1990, at 5-6 (summarizing state and federal marital rape laws).

166. See *Doe*, 929 F. Supp. at 610. The complaint accused John Doe of "throwing [his wife] to the floor, kicking her, throwing sharp and dangerous objects at her, [and] threatening to kill her." *Id.* Jane Doe alleged that her now estranged husband forced her to live and work in "slave-like" conditions, and required her to lay out clothes for him to wear during his dozens of extramarital affairs. See *id.*; see also Pazniokas, *supra* note 165, at A1, available in 1996 WL 4369235. The complaint further alleged that when Jane Doe told her husband she planned to leave him, he imprisoned her in their house and repeatedly threatened her with a shotgun, shouting, "I'm going to [expletive] kill you . . . I'm going to [expletive] bury you." *Id.* When Jane Doe finally escaped from their house, John Doe chased her down and threw her against a car. See *id.*; see also BERGEN, *supra* note 165, at 43 (describing instances where women are kidnapped by their partners and raped or battered).

167. See *Doe*, 929 F. Supp. at 610. The defendant also claimed Congress lacked the authority to enact VAWA under the Fourteenth Amendment. See *id.*

168. See *id.* at 613.

169. See *id.*

170. See *id.* at 615-16.

171. See *id.* at 617.

172. See *id.* at 612; see also *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276-77 (1981) (emphasizing that the Court must defer to congressional findings if they are supported by a "rational basis"); *Katzenbach v. McClung*, 379 U.S. 294, 303-04 (1964) (employing the rational basis test to uphold the validity of Title II of the Civil Rights Act of 1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261-

overruled the rational basis test, the *Doe* court did recognize the importance of limiting the reach of the commerce power, in order to avoid infringing upon states' rights.¹⁷³ After finding the rational basis test applicable, the court rejected the defendant's contention that Congress lacked the authority to pass VAWA under its commerce power.¹⁷⁴

2. Finding a Substantial Effect on Interstate Commerce

The *Doe* court held that the congressional findings "qualitatively and quantitatively" demonstrated that gender-based violence had a substantial effect on interstate commerce, clearly providing a rational basis for congressional action.¹⁷⁵ The court distinguished *Lopez* by giving great weight to both the findings contained in the final reports of the Senate and House of Representatives.¹⁷⁶ The court further distinguished *Lopez* by noting that the Gun-Free School Zones Act at issue in *Lopez* relied primarily on theoretical arguments rather than statistical findings concerning the potential impact of guns in schools on interstate commerce.¹⁷⁷ The *Doe* court found that the statistical evidence Congress relied on in passing VAWA, specifically, the civil rights provision, left no doubt about the possible effects of gender-based violence on interstate commerce.¹⁷⁸ Thus, the *Doe* court could rely on specific factual findings of Congress to support a finding of a rational basis for the regulation.¹⁷⁹

62 (1964) (same).

173. See *Doe*, 929 F. Supp. at 613 (acknowledging *Lopez*'s recognition of commerce power limits, but finding that *Lopez* reaffirmed the rational basis test).

174. See *id.* at 610 (holding that Congress had a rational basis for enacting VAWA and that the legislation was "narrowly tailored and reasonably adopted to accomplish a constitutionally permitted end").

175. *Id.* at 613. In distinguishing VAWA from the Gun-Free School Zones Act, the *Doe* court found that the congressional testimony and reports clearly supported a connection to interstate commerce. See *id.* at 613-14.

176. See *id.* The Senate committee found that gender-based crimes restricted movement, reduced employment and consumer spending, and increased health care costs, all of which affected interstate commerce. See *id.* at 613 (quoting S. REP. NO. 103-138, at 54 (1993)). The House of Representatives conference found that gender-motivated violence reduced the amount of interstate travel, affecting interstate spending and interstate employment. See *id.* at 613-14 (quoting H.R. CONF. REP. NO. 103-711, at 385 (1994)).

177. See *id.* at 613 (finding that the Act invalidated in *Lopez* lacked any congressional findings regarding the effect of guns on interstate commerce).

178. See *id.* at 614. The court stated that "because of the extensive compilation of data, testimony, and reports on which Congress based its findings, this Court is not left to speculate or 'pile inference upon inference to perceive an explicit connection between the regulated activity and interstate commerce.'" *Id.* (quoting *United States v. Sage*, 906 F. Supp. 84, 92 (D. Conn. 1995), *aff'd*, 92 F.3d 101 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997)).

179. See *id.*

In determining whether gender-based violence substantially affected interstate commerce, the *Doe* court, relying on *Wickard v. Filburn*'s cumulative effect reasoning,¹⁸⁰ held that although interstate commerce might not be substantially affected by the non-participation of one survivor of gender-based violence, the repetitive prevention of women nationwide from participation and movement in society would substantially impact commerce.¹⁸¹ *Doe* thereby rejected the notion that *Lopez* eliminated such an aggregate theory.¹⁸²

Drawing further support for its position, the court in *Doe* noted that since the *Lopez* decision, many federal courts had upheld a variety of congressional enactments under the Commerce Clause.¹⁸³ Although the Supreme Court found the statute in question in *Lopez* unconstitutional, the *Doe* court noted that federal courts have held that similar statutes were constitutional when properly supported by congressional findings.¹⁸⁴

3. Negating a Claim of Infringement on States' Rights

In addressing the defendant's final claim, the *Doe* court held that VAWA's civil rights remedy did not improperly infringe upon states' rights.¹⁸⁵ *Doe* emphasized that unlike state criminal statutes, a federal civil remedy makes offenders personally responsible to their victims.¹⁸⁶

180. See *id.* (comparing the effect a sole survivor of domestic violence has on interstate commerce with the effect produced by a sole wheat harvester). In *Wickard*, the Supreme Court held that while the activities of one wheat farmer may not substantially affect interstate commerce, similar activities by several farmers would create a cumulative result that clearly would affect interstate commerce. See *Wickard v. Filburn*, 317 U.S. 111, 128 (1942); *supra* notes 115-22 and accompanying text (discussing the *Wickard* holding).

181. See *Doe*, 929 F. Supp. at 614; cf. *Katzenbach v. McClung*, 379 U.S. 294, 303 (1964) (holding that a restaurant's refusal to serve black customers would have a substantial effect on interstate commerce and the national economy).

182. Cf. *Doe*, 929 F. Supp. at 613-14 (acknowledging the *Lopez* holding, but applying the *Wickard* standard). For a discussion of the effect the *Lopez* decision had on the *Wickard* aggregation principle, see Arkin, *supra* note 18, at 1598.

183. See *Doe*, 929 F. Supp. at 615. The court listed 11 civil and criminal statutes that were upheld after *Lopez*. See *id.*; see also *United States v. Soderna*, 82 F.3d 1370, 1379 (7th Cir.) (upholding the Freedom of Access to Clinic Entrances Act), *cert. denied*, 117 S. Ct. 507 (1996); *United States v. Genao*, 79 F.3d 1333, 1336-37 (2d Cir. 1996) (upholding a cocaine distribution conspiracy statute based on congressional findings that local narcotics activity substantially affects interstate commerce); *United States v. Wilks*, 58 F.3d 1518, 1521-22 (10th Cir. 1995) (upholding a law that criminalizes the possession and distribution of machine guns); *United States v. Collins*, 921 F. Supp. 1028, 1034-36 (W.D.N.Y. 1996) (holding the Child Support Recovery Act of 1992 constitutional because failure to pay child support substantially affects interstate commerce).

184. See *Doe*, 929 F. Supp. at 615.

185. See *id.* at 616.

186. See *id.* *Doe* further stated that VAWA's civil rights remedy complemented state

Noting that victims of gender-motivated crimes may bring assault and battery tort claims in state courts,¹⁸⁷ the *Doe* court stressed that nothing precludes victims from pursuing other causes of actions; rather, VAWA merely provides an additional federal civil rights remedy.¹⁸⁸

In conclusion, the *Doe* court found the means utilized by Congress reasonably adapted to the goal of establishing a civil rights remedy for victims of gender-based crimes, which substantially affect interstate commerce.¹⁸⁹ Therefore, the court in *Doe* found that the Constitution authorized Congress, under its commerce power, to enact the civil rights provision of VAWA.¹⁹⁰

B. *Brzonkala v. Virginia Polytechnic & State University: Connecting Civil Rights and the Commerce Clause*

One month after the decision in *Doe*, a Federal District Court in Virginia reached an opposite result when considering the constitutionality of VAWA's civil rights provision.¹⁹¹ The Fourth Circuit, however, reversed the district court's ruling and found that Congress acted within its commerce power in passing the civil rights provision of VAWA.¹⁹² In *Brzonkala v. Virginia Polytechnic & State University*,¹⁹³ a female Virginia Tech student brought a civil complaint under VAWA against two male students alleging a violation of her right to be free from gender-based violence.¹⁹⁴ Christy Brzonkala, a freshman student-athlete, accused two university football players of sexual assault and rape.¹⁹⁵ Brzonkala al-

law by "recognizing a societal interest in ensuring that persons have a civil right to be free from gender-based violence." *Id.*

187. *See id.*

188. *See id.*; *see also* Hallock, *supra* note 27, at 595 (categorizing VAWA as providing victims of gender-based violence with an additional forum for judicial relief).

189. *See Doe*, 929 F. Supp. at 617.

190. *See id.* at 616.

191. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 801 (W.D. Va. 1996) (finding the civil rights provision of VAWA to be an unconstitutional exercise of Congress's commerce power), *rev'd*, No. 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997).

192. *See Brzonkala v. Virginia Polytechnic & State Univ.*, No. 96-2316, 1997 WL 785529, at *26 (4th Cir. Dec. 23, 1997).

193. 935 F. Supp. 779 (W.D. Va. 1996), *rev'd*, No. 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997).

194. *See id.* at 781-82.

195. *See id.* at 781. Brzonkala accused James Crawford and Antonio (Tony) Morrison of sexual assault and rape. *See id.* In an amended complaint, Brzonkala brought additional claims against Virginia Tech, William Landside, comptroller of the Commonwealth of Virginia, and Cornell Brown, another university football player. *See id.* In a separate opinion, the district court dismissed the charges against Virginia Tech, Landside, and Brown. *See Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 772, 779 (W.D.

leged that after she had verbally denied their demands for sex, the two men raped her in a dormitory bedroom.¹⁹⁶ Brzonkala failed to receive adequate remedial relief from either the university¹⁹⁷ or the criminal justice system.¹⁹⁸ She filed an \$8.3 million civil suit under VAWA.¹⁹⁹

Va. 1996), *rev'd*, No. 96-1814, 1997 WL 785529 (4th Cir. Dec. 23, 1997). The university did not charge Brown, a first-team All-American defensive end for the Hokies during the 1995 season or subject him to a criminal investigation. See *Virginia Tech Football Players Not Indicted for Alleged Rape*, WASH. POST, Apr. 11, 1996, at D3 [hereinafter *Players Not Indicted*]. In dismissing the charges against Virginia Tech, the district court stated that Brzonkala failed to adequately support her allegations of gender-bias by the university. See *Brzonkala*, 935 F. Supp. at 777; see also *Va. Tech Dismissed From Rape Lawsuit; Judge: Discrimination Claim Unsupported*, WASH. POST, May 8, 1996, at D6. But see *Brzonkala*, 1997 WL 785529, at *5-12 (reversing the lower court and finding that Brzonkala presented sufficient evidence to bring a Title IX claim against Virginia Tech).

196. See *Brzonkala*, 935 F. Supp. at 782. Brzonkala alleged that after talking with Morrison and Crawford for less than half an hour, Morrison asked to have sex with her. See *id.* The complaint alleged that Brzonkala verbally denied Morrison's request twice. See *id.* When Brzonkala attempted to leave the dormitory room, Morrison forced her onto the bed and raped her, pinning his knees against her legs and forcing her to submit to vaginal intercourse. See *id.* Again, Brzonkala attempted to escape. See *id.* Crawford then entered the room, and raped Brzonkala. See *id.* Before Brzonkala could recover, Morrison raped her a second time. See *id.* Following the third rape, Morrison told Brzonkala, "You better not have any fucking diseases." *Id.* Sometime after these events, but prior to any formal hearing, Morrison announced to a group of students in the dining hall that, "I like to get girls drunk and fuck the shit out of them." *Id.* Neither Crawford nor Morrison knew Brzonkala prior to the night of the attack. See *id.*

197. See *id.* Seven months after the incident, Brzonkala filed a complaint with Virginia Tech under the university's sexual assault policy. See *id.* A student judicial hearing committee found Morrison guilty of sexual assault and suspended him from the university for two semesters. See *id.*; see also Athelia Knight, *Va. Tech Asks for Dismissal of Student's Civil Lawsuit*, WASH. POST, Jan. 20, 1996, at H4. The committee lacked sufficient evidence against Crawford. See *Brzonkala*, 935 F. Supp. at 782. Morrison appealed the committee's decision and a second hearing committee found him guilty of the lesser charge of abusive conduct. See *id.* Morrison appealed the second decision to the university provost. See *id.* Without discussing the resulting decision with Brzonkala or providing her with any notice, the university provost vacated the suspension and permitted Morrison to return to campus. See *id.* After reading in a newspaper that Morrison would be returning to Virginia Tech, Brzonkala, fearing for her safety, refused to return to the university that fall. See Knight, *supra*, at H4. Brzonkala transferred to George Mason University in Fairfax, Virginia. See Nina Bernstein, *Civil Rights Lawsuit in Rape Case Challenges Integrity of a Campus*, N.Y. TIMES, Feb. 11, 1996, at A1.

198. See Michael D. Shear, *Judge Rejects U.S. Law for Abuse Victims: Allowing Women to Sue Ruled Unconstitutional*, WASH. POST, July 30, 1996, at A1. After two months of state police investigation, a grand jury failed to deliver indictments against Morrison and Crawford. See *Players Not Indicted*, *supra* note 195, at D3. Since the alleged altercation between Crawford and Brzonkala, police arrested Crawford on other rape charges. See Angie Watts, *Va. Tech Players Arrested: Edmonds, Crawford Deny Rape Charges*, WASH. POST, Dec. 17, 1996, at E1.

199. See Bernstein, *supra* note 197, at A1. According to Brzonkala's attorney, Eileen N. Wagner, \$8.3 million is a symbolic figure. See *id.* The figure represented the amount Virginia Tech collected from its football team's participation in the 1995 Sugar Bowl. See

1. *The District Court: Disallowing Congressional Regulation of Gender-Based Crimes*

In *Brzonkala*, district court Judge Jackson L. Kiser²⁰⁰ held that VAWA's civil rights provision was an unconstitutional exercise of the Commerce Clause.²⁰¹ The district court questioned whether Brzonkala's allegations that the attack was gender-motivated entitled her to a cause of action under VAWA,²⁰² and whether this provision of VAWA was constitutional under Congress's commerce power.²⁰³ Finding the rape to

id.

200. One of Judge Kiser's more well-known decisions was *United States v. Virginia*, in which he upheld the exclusion of female students from the all-male, Virginia Military Institute. See 852 F. Supp. 471, 484 (W.D. Va. 1994), *aff'd*, 44 F.3d 1229 (4th Cir. 1995); *rev'd*, 116 S. Ct. 2264 (1996). In an opinion authored by Justice Ruth Bader Ginsburg, the Supreme Court reversed his decision, holding that such a policy violated the Equal Protection Clause of the Fourteenth Amendment. See *United States v. Virginia*, 116 S. Ct. 2264, 2287 (1996).

201. See *Brzonkala*, 935 F. Supp. at 801.

202. See *id.* at 784. The court applied the "totality of the circumstances" test, mandated by Congress when it passed VAWA, to analyze whether gender motivated the attack. See *id.* (citing S. REP. NO. 102-197, at 50 (1991)). Some of the circumstances triers-of-fact consider include: "language used by the perpetrator; the severity of the attack . . .; the lack of provocation; previous history of similar incidents; absence of any other apparent motive . . .; common sense." S. REP. NO. 102-197, at 50 n.72. Focusing on several key facts, the court found that Brzonkala's claim was valid under the gender animus provision of VAWA. See *Brzonkala*, 935 F. Supp. at 785. First, Judge Kiser noted that the attack involved a gang rape, which generally is considered more egregious than a one-on-one rape because it suggests "a conspiracy of disrespect for that woman." *Id.* at 784 (emphasis added). Second, Judge Kiser held that the alleged rape resembled a stranger rape motivated by gender animus. See *id.* at 784-85. Unlike stranger rapes, according to the court, acquaintance or date rapes more often involve misunderstandings or escalated sexual passion between the parties. See *id.* at 785. Finally, the court found the defendants' lack of personal knowledge of the victim indicative of a random act of gender-based violence, rather than an act specifically geared toward one particular victim. See *id.* Judge Kiser distinguished the rape of Brzonkala from acquaintance rape, noting that acquaintance rape could be motivated by a personal animus toward the victim as a person, not necessarily as a woman. See *id.*

As to Morrison, the court took specific notice of his language subsequent to the assault. See *id.* The court found that the derogatory nature of Morrison's remarks indicated a clear disrespect for all women, not just Brzonkala. See *id.* Furthermore, Morrison bragged about the violent nature of his sexual encounters, indicating a pattern of abusive behavior and disrespect for women. See *id.* In statements following the assault, Morrison displayed a preference toward intercourse with intoxicated women. See *id.* The parties disagreed as to whether Brzonkala was intoxicated at the time of the alleged assault. See *id.* at 782, 785. Morrison's description of his sexual preferences, however, provided "[a] reasonable inference that Brzonkala was intoxicated at the time of [the attack]." *Id.* at 785. Applying these facts under the totality of the circumstances test, the court found the allegations in the complaint met the minimum federal pleading requirements describing a gender-based motivation for the attack. See *id.*

203. See *Brzonkala*, 935 F. Supp. at 783. The defendants also challenged the constitutionality of VAWA under the Enforcement Clause of the Fourteenth Amendment. See *id.*

be gender-motivated, the court focused on the constitutionality of VAWA as enacted under Congress's commerce power.²⁰⁴

The district court in *Brzonkala* failed to find a connection between gender-based violence and interstate commerce sufficient to support Congress's exercise of its commerce power.²⁰⁵ The court acknowledged that although congressional findings are helpful in determining constitutionality, they are not conclusive,²⁰⁶ for the ultimate determination of constitutionality belongs to the judiciary, not the legislature.²⁰⁷ Based on *Brzonkala*'s similarities to *Lopez*, the district court found the civil rights provision of VAWA unconstitutional under Congress's commerce power.²⁰⁸

at 793. The Enforcement Clause issue is beyond the scope of this Note.

204. See *id.* at 785. First, the district court outlined the three areas of interstate commerce Congress may regulate. See *id.* at 786 (noting Congress's authority to regulate the channels and instrumentalities of interstate commerce, as well as activities having a substantial effect on interstate commerce); see *supra* notes 7-14 and accompanying text (discussing in detail the three permissible areas of congressional commerce power regulation). Next, the court dismissed any contention that VAWA fell within either of the first two categories of regulation in that VAWA regulated neither a channel nor instrumentality of interstate commerce. See *Brzonkala*, 935 F. Supp. at 786. The district court thus concentrated its analysis on the third category of regulation, presuming that Congress justified its enactment of VAWA under its power to regulate activities having a substantial effect on interstate commerce. See *id.* (analyzing whether Congress sought to regulate activities with substantial effects on interstate commerce).

The district court analogized VAWA to the Gun-Free School Zones Act by dividing *United States v. Lopez* into four areas of analysis: (1) the nature of the regulated activity; (2) the jurisdictional requirements as related to an individual activity; (3) the relevance of legislative history; and (4) the practical implications of enforcing the Act. See *Brzonkala*, 935 F. Supp. at 786-87. The *Lopez* Court concentrated its analysis on areas three and four. See *United States v. Lopez*, 514 U.S. 549, 559-68 (1995). Focusing on the similarities between VAWA and the Gun-Free School Zones Act, the *Brzonkala* district court noted that both statutes attempted to regulate non-commercial activities. See *Brzonkala*, 935 F. Supp. at 791. Based on *Lopez*, the district court found that an activity's economic nature was important to the analysis of the regulation of interstate activity. See *id.* Next, the *Brzonkala* district court noted that, similar to the Gun-Free School Zones Act, VAWA lacked a jurisdictional provision limiting causes of action to those involving interstate commerce. See *id.* at 792. The court stated that until the need for a jurisdictional element is determined, decisions should favor limiting the federal government's regulatory power through such a mechanism. See *id.*

205. See *Brzonkala*, 935 F. Supp. at 793.

206. See *id.* at 789.

207. See *id.* at 788-89.

208. See *id.* at 801. See generally Chris A. Rauschl, Comment, *Brzonkala v. Virginia Polytechnic and State University: Violence Against Women, Commerce, and the Fourteenth Amendment—Defining Constitutional Limits*, 81 MINN. L. REV. 1601 (1997) (discussing the facts and outcome of the case under both a Commerce Clause and Fourteenth Amendment analysis).

2. *The Fourth Circuit: Using Congressional Findings to Connect Gender-Based Violence and Interstate Commerce*

On December 23, 1997, the Fourth Circuit reversed Judge Kiser's decision and found that VAWA's civil rights provision was, in fact, constitutional under the Commerce Clause.²⁰⁹ In *Brzonkala*, the Fourth Circuit began its analysis by emphasizing that every legislative enactment is entitled to a presumption of validity, and should be given deference.²¹⁰ The court recognized that the judiciary should not second-guess decisions based on years of testimony and congressional research,²¹¹ but rather, simply should review that particular exercise of congressional power.²¹² In so finding, the Fourth Circuit reaffirmed a rational basis review as the proper standard.²¹³

The Fourth Circuit found that the existence of congressional findings does not provide guarantees of constitutionality, but rather, "a court must defer to congressional findings when there is a rational basis for such a finding."²¹⁴ The court restated the text of congressional findings and, in particular, the fact that the House of Representatives concluded that "crimes of violence motivated by gender have a substantial adverse

209. See *Brzonkala v. Virginia Polytechnic & State Univ.*, No. 96-2316, 1997 WL 785529, at *26 (4th Cir. Dec. 23, 1997). Before discussing the Commerce Clause issue, the Fourth Circuit addressed the defendants' contention that *Brzonkala* failed to show that a "crime of violence motivated by gender" had occurred. *Id.* at *13; see *supra* note 32 (quoting VAWA's statutory definition of gender motivation). The Fourth Circuit noted that the standard for evaluating gender motivation was the same standard as that used in sex or race discrimination cases and that judges need only to apply a "totality of the circumstances" test. See *Brzonkala*, 1997 WL 785529, at *13; *supra* note 202 (listing the factors to be utilized by the trier-of-fact when making a totality of the circumstances determination concerning gender-motivation). In reapplying the same factors used by the district court to determine if *Brzonkala* had stated a claim, the Fourth Circuit affirmed the district court's analysis in this area. See *Brzonkala*, 1997 WL 785529, at *14. Like the district court, the court of appeals considered the language used by Morrison and Crawford, both during and after the attack, the brutality of the attack itself, and "the absence of any 'apparent motive'" for the attack. See *id.* (quoting S. REP. NO. 103-138, at 52 n.61 (1993)).

210. See *Brzonkala*, 1997 WL 785529, at *15; see also *Barwick v. Celotex Corp.*, 736 F.2d 946, 955 (4th Cir. 1984) (citing support for the strong presumption of validity of federal statutes).

211. See *Brzonkala*, 1997 WL 785529, at *15.

212. See *id.* Furthermore, congressional legislation should not be invalidated unless compelling constitutional reasons exist for such action. See *id.*

213. See *id.*; see also *United States v. Lopez*, 514 U.S. 549, 557 (1995).

214. *Brzonkala*, 1997 WL 785529, at *17 (internal quotations omitted). Adopting a straightforward approach, the Fourth Circuit stated, "[o]ur task is simply to discern whether . . . violence against women—substantially affect[s] interstate commerce." *Id.* at *19 (internal quotations omitted).

effect on interstate commerce.”²¹⁵ In reviewing the extensive congressional findings surrounding the passage of VAWA, the court, without hesitation, found that Congress had a rational basis to enact the civil rights provision of VAWA.²¹⁶

Like the district court, the Fourth Circuit also compared VAWA to the Gun-Free School Zones Act at issue in *Lopez*, but reached a different conclusion.²¹⁷ First, the court noted that at the time of the enactment of the Gun-Free School Zones Act, Congress had not made any findings to support the legislation.²¹⁸ In comparison, when Congress enacted VAWA it had shown “exhaustive” and “meticulous” support of the legislation through congressional findings.²¹⁹ Second, the court focused on the fact that the Gun-Free School Zones Act attempted to intervene into areas of state control.²²⁰ VAWA, by contrast, provides an additional federal remedy to existing state laws.²²¹ The court noted that Congress, in an attempt to “harmonize” VAWA with existing state law, explicitly exempted certain areas of state control through the language of the statute.²²² Third, the court noted that civil rights is an area of legislation which traditionally has been regulated by the federal government, not the individual states.²²³

Next, the court addressed the defendants’ contention that the civil rights provision of VAWA is unconstitutional because the Act regulates non-economic activity, and, therefore, cannot be connected sufficiently to interstate commerce.²²⁴ The Fourth Circuit, however, noted the defendants’ erroneous reading of the *Lopez* holding.²²⁵ The correct reading

215. *Id.* at *18 (quoting H.R. CONF. REP. NO. 103-711, at 385 (1994)).

216. *See id.* at *20; *see also supra* notes 27-28, 34 for the text of the congressional findings upon which the Fourth Circuit relied.

217. *See Brzonkala*, 1997 WL 785529, at *21-22.

218. *See id.* at *21; *infra* note 255 (noting that, by the time *Lopez* reached the Supreme Court, statistical findings had been demonstrated).

219. *See Brzonkala*, 1997 WL 785529, at *18. Unlike the *Lopez* Court, the Fourth Circuit in *Brzonkala* was not required to “pile inference upon inference” to connect gender-motivated crimes to interstate commerce. *See id.* at *21. *But see Lopez*, 514 U.S. at 567.

220. *See Brzonkala*, 1997 WL 785529, at *22.

221. *See id.* (“Nothing in Title III prevents a victim of gender-based violence from bringing state criminal charges or pursuing state tort remedies, or affects how the state treats those claims.”).

222. *See id.* (listing divorce or child custody proceedings).

223. *See id.* (noting that regulation is particularly appropriate when state attempts to protect gender-based violence prove inadequate). The Fourth Circuit emphasized that civil rights long had been “a quintessential area of federal expertise.” *Id.* at *23.

224. *See id.*

225. *See id.* Although Morrison and Crawford conceded at the circuit level that *Lopez* does not require that an activity be economic in nature in order for regulation to occur,

of *Lopez*, that regulation may occur as long as the activity substantially affects interstate commerce, supports the validity of the civil rights provision.²²⁶ The Fourth Circuit in *Brzonkala* held that VAWA “regulates an activity that is ‘an essential part of a larger regulation of economic activity,’”²²⁷ and which substantially affects interstate commerce.²²⁸ The Fourth Circuit reversed the district court’s decision,²²⁹ and held that Congress had a rational basis to enact the civil rights provision of VAWA.²³⁰

In stark contrast to the majority opinion, Judge Luttig filed a dissenting opinion unreservedly endorsing the district court’s decision.²³¹ Judge Luttig criticized the majority for failing to conduct an independent evaluation of the effect of gender-based violence on interstate commerce,²³² by instead relying completely on congressional findings.²³³ The dissent argued that by relying on these findings, the majority treated Congress’s opinions as “dispositive of the constitutional inquiry.”²³⁴ In conducting his own independent review, Judge Luttig agreed with the

the defendants overlooked the basic finding in *Lopez*. See *id.* The *Lopez* Court invalidated the Gun-Free School Zones Act, not because the Act attempted to regulate a non-economic activity, but because the activity did not substantially effect interstate commerce. See *id.*; *Lopez*, 514 U.S. at 562-65.

226. See *Brzonkala*, 1997 WL 785529, at *24. But see *Brzonkala*, 1997 WL 785529, at *30 (Luttig, J., dissenting) (arguing that the *Brzonkala* majority treated *Lopez* as an “aberration” and “as if [it] were never decided”).

227. *Id.* (quoting *Lopez*, 514 U.S. at 561). In so holding, the Fourth Circuit relied, in part, on precedent established in *Wickard* and the *Civil Rights Cases*. See *id.*; see also *supra* notes 121-22 (discussing the Court’s analysis in *Wickard*), 126-40 (discussing the *Civil Rights Cases*).

228. See *Brzonkala*, 1997 WL 785529, at *26. The defendants also argued that to uphold VAWA’s civil rights provision under a Commerce Clause analysis would be to authorize congressional regulation in any area, including “diet and exercise habits.” See *id.* at *25. The Fourth Circuit stated that such an argument “belittles the seriousness of the national problem that discriminatory violence against women presents.” *Id.*

229. See *id.* at *26.

230. See *id.* at *25, *26.

231. See *id.* at *26 (Luttig, J., dissenting) (calling Judge Kiser’s opinion “an excellent legal analysis” and “abidingly faithful” to *Lopez*).

232. See *id.*

233. See *id.* at *27. After extensively criticizing the majority’s reliance on congressional findings, Judge Luttig seemingly contradicted himself by stating that, in at least one circumstance, the majority’s analysis would be “understandable.” See *id.* at *28. The dissent stated: “[W]holesale deference to a committee finding would . . . be understandable if that committee had made extensive findings deserving of deference.” *Id.* (emphasis added). But see *supra* note 27 (providing the history and results of four years of congressional testimony and research on the impact of gender-based violence on interstate commerce).

234. *Id.*

district court and found that the congressional findings surrounding VAWA failed to support any connection to interstate commerce.²³⁵

III. THE FUTURE OF THE CIVIL RIGHTS PROVISION: FINDING A SUFFICIENT INTERSTATE COMMERCE CONNECTION

The Supreme Court is likely to confront the constitutionality of VAWA within the next several years.²³⁶ Despite the reasoning of the district court in *Brzonkala*, VAWA is different from the Gun-Free School Zones Act at issue in *Lopez*. The Supreme Court should not arrive at the same conclusion as it did in *Lopez*, and should instead uphold the constitutionality of VAWA's civil rights provision. Three factors weigh heavily in favor of the constitutionality of VAWA: (1) congressional findings support a substantial relation to interstate commerce;²³⁷ (2) states inadequately combat the problem of gender-based violence;²³⁸

235. See *id.* at *28. Judge Luttig takes pains to note that the majority "never mention[ed] that the Senate, as opposed to the House, did not conclude that such violence substantially affects interstate commerce." *Id.* at *26. Although the Senate may not have used the exact language "substantially affect" to satisfy Judge Luttig's standard, the Senate did find that, "[g]ender-based crimes and the fear of gender-based crimes... affect interstate commerce." S. REP. NO. 103-138, at 54 (1993); see also *Brzonkala*, 1997 WL 785529, at *19 (acknowledging the findings of the Senate); *supra* notes 150-54 and accompanying text (noting that *Lopez* requires only that an activity substantially affect interstate commerce).

236. See *Brzonkala*, 1997 WL 785529, at *30 (Luttig, J., dissenting) (predicting that the Court will revisit the same Commerce Clause issues from *Lopez* in the context of VAWA, stating that "the instant statute pristinely presents the Court with the logical next case in its considered revisitation of the Commerce Clause"); Kerrie E. Maloney, Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876, 1877-78 (1996) (predicting future challenges to Commerce Clause enactments until the Court clarifies its holding in *Lopez*); Jennifer C. Philpot, Note, *Violence Against Women and the Commerce Clause: Can This Marriage Survive?*, 85 KY. L.J. 767, 792-800 (1997) (arguing that the same commerce power concerns surrounding the Gun-Free School Zones Act will resurface in a challenge to the civil rights provision of VAWA); Shear, *supra* note 198, at A1 (reporting predictions that the Supreme Court will affirm *Brzonkala* by a vote of five to four); see also Peter J. Liuzzo, Comment, *Brzonkala v. Virginia Polytechnic and State University: The Constitutionality of the Violence Against Women Act—Recognizing that Violence Targeted at Women Affects Interstate Commerce*, 63 BROOK. L. REV. 367, 393 (1997) (advocating the constitutionality of VAWA under a Commerce Clause analysis); Rauschl, *supra* note 208, at 1639 (predicting, incorrectly, that the district court's invalidation of the civil rights provision would withstand further challenge).

237. See *Brzonkala*, 1997 WL 785529, at *17-19; *Doe v. Doe*, 929 F. Supp. 608, 613-14 (D. Conn. 1996); Weiss, *supra* note 31, at 727-31 (reviewing the extensive congressional findings supporting VAWA).

238. See *Brzonkala*, 1997 WL 785529, at *23; see also Goldscheid & Kraham, *supra* note 30, at 506-07 (discussing the inadequacy of state remedies as one reason for the promulgation of the civil rights provision).

and (3) lower courts, applying a long series of Supreme Court Commerce Clause cases, consistently have upheld congressional statutes similar to VAWA.²³⁹

A. Giving Deference to Congressional Findings

In analyzing the constitutionality of VAWA under the Commerce Clause, both the *Brzonkala* and *Doe* courts focused on congressional findings concerning gender-motivated violence.²⁴⁰ Prompted by the *Lopez* Court's discussion of the lack of congressional findings when the Court decided that guns in school zones did not substantially affect interstate commerce, both *Brzonkala* and *Doe* emphasized congressional findings.²⁴¹ *Lopez* reaffirmed that the enactment of legislation does not require congressional findings,²⁴² and that Congress may regulate in the absence of formal findings.²⁴³ The *Lopez* Court noted, however, that congressional findings aid the Court in connecting a regulated activity to interstate commerce.²⁴⁴ The *Lopez* decision is a clear signal that courts

239. Cf. *Brzonkala*, 1997 WL 785529, at *19 (noting that a majority of lower courts have upheld congressional enactments using a rational basis test). See, e.g., *United States v. Kegel*, 916 F. Supp. 1233, 1235 (M.D. Fla. 1996) (upholding the constitutionality of the 1992 Child Support Recovery Act); *United States v. Murphy*, 893 F. Supp. 614, 617 (W.D. Va. 1995) (same), *vacated and remanded*, 934 F. Supp. 736 (W.D. Va. 1996), *rev'd*, 117 F.3d 137 (4th Cir. 1997); *United States v. Hampshire*, 892 F. Supp. 1327, 1331 (D. Kan. 1995) (same), *aff'd*, 95 F.3d 999 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 753 (1997); *United States v. Garcia-Salazar*, 891 F. Supp. 568, 572 (D. Kan. 1995) (recognizing the Drug-Free School Zones Act as a valid exercise of Congress's commerce power).

240. See *Brzonkala*, 1997 WL 785529, at *17-19; *Doe*, 929 F. Supp. at 611; *supra* notes 27-28 (detailing congressional findings of violence against women that Congress relied upon when passing VAWA).

241. See *United States v. Lopez*, 514 U.S. 549, 562-63 (1995). The *Lopez* Court did not rely on congressional findings when making its decision because they did not exist. See *id.* The government, in fact, conceded that express findings were absent from the legislative history of the Gun-Free School Zones Act. See *id.* at 562. In *Brzonkala*, the Fourth Circuit found it "particularly telling" that although Congress enacted VAWA prior to the Court's decision in *Lopez*, the congressional findings support the premise that gender-based violence "substantially affect[s]" interstate commerce. *Brzonkala*, 1997 WL 785529, at *18 n.10.

242. See *Lopez*, 514 U.S. at 562-63; see also *Brzonkala*, 1997 WL 785529, at *17.

243. See *Lopez*, 514 U.S. at 562-63; see also *Fullilove v. Klutznick*, 448 U.S. 448, 503 (1980) (Powell, J., concurring) (stating that Congress has no obligation to articulate findings); *Perez v. United States*, 402 U.S. 146, 156 (1971) (holding that Congress "need [not] make particularized findings in order to legislate"); *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (noting that a lack of congressional findings does not automatically invalidate a statute (citing *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938))); *Spence, supra* note 3, at 653 (commenting that Congress is not required to articulate specific reasons for regulation).

244. See *Lopez*, 514 U.S. at 563 (stating that congressional findings could enable the Court to better evaluate effects on interstate commerce).

should consider those findings when determining the constitutionality of legislation.²⁴⁵ Using the *Lopez* Court's analysis, both *Brzonkala* and *Doe* found that the congressional findings underlying VAWA sufficiently connected gender-based violence to interstate commerce.²⁴⁶

In promulgating VAWA, Congress found that gender-motivated violence meets the standard required for regulation under the Commerce Clause.²⁴⁷ The Senate concluded:

Gender-based crimes and the fear of gender-based crimes restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy. Gender-based violence bars its most likely targets—women—from full [participation] in the national economy.²⁴⁸

Furthermore, fear of gender-motivated violence causes women to decline to work in areas or at certain hours when there is a greater risk of such violence.²⁴⁹ In addition, the House of Representatives reported that gender-motivated crimes deter victims from traveling interstate and conducting interstate business transactions.²⁵⁰ This violence further extends to increase health care costs and decrease demand for interstate products.²⁵¹

The district court in *Brzonkala* gave little weight to these findings concerning gender-based violence and its effects on interstate commerce.²⁵²

245. See *id.* at 562-63.

246. See *Brzonkala*, 1997 WL 785529, at *12; *Doe*, 929 F. Supp. at 613-14; *supra* notes 27-28 (listing congressional findings). But see *Brzonkala*, 935 F. Supp. at 801 (holding the civil rights provision of VAWA unconstitutional and finding that despite congressional findings, gender-based violence did not substantially affect interstate commerce).

247. See S. REP. NO. 103-138, at 54 (1993).

248. *Id.*

249. See *id.*

250. See H.R. CONF. REP. NO. 103-711, at 385 (1994); *supra* note 215 and accompanying text for findings of the House of Representatives.

251. See H.R. CONF. REP. NO. 103-711, at 385. The reasons advanced by Congress in enacting VAWA were similar to those underlying the passage of the Civil Rights Act of 1964. See S. REP. NO. 103-138, at 54-55. Deferring to Congress's judgment, the *Brzonkala* court noted that civil rights has been an area of federal regulation since shortly after the Civil War. See *Brzonkala*, 1997 WL 785529, at *22; *supra* note 209 (describing how Congress intended the same standard of review for VAWA as for other civil rights legislation). Even Senator Biden analogized gender-motivated discrimination to race-based discrimination when advocating the enactment of VAWA's civil rights provision. See Klein, *supra* note 23, at 254 n.7 (commenting on Senator Biden's guarantee of protection for victims of gender-based violence); cf. McElroy, *supra* note 22, at 74 (noting that both gender and race-motivated crimes allow for civil rights remedies).

252. See *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 779, 793, 801 (W.D. Va. 1996) (finding VAWA an unconstitutional exercise of the commerce power).

Ignoring factual conclusions that illustrated the economic effects of violence against women,²⁵³ the district court stated that Congress's perceptions regarding an activity's effect on commerce, whether positive or negative, did not bind the court; it is the actual effect, the court argued, that is determinative.²⁵⁴ The *Brzonkala* district court erred by failing to distinguish *Lopez* on the grounds that the statute in question in *Lopez* was unaccompanied by any insightful findings upon which to rely,²⁵⁵ a defect from which VAWA does not suffer.²⁵⁶

In reversing the lower court, the Fourth Circuit, however, properly embraced congressional findings as the best indicator of the effect of gender-based violence on interstate commerce.²⁵⁷ Taking notice of the specific legislative findings by both the House and the Senate, the Fourth Circuit allowed the statistical proof to speak for itself.²⁵⁸ Consequently, the court could easily concur with Congress's judgment.²⁵⁹

Taking the correct cue from *Lopez*, the *Doe* court properly relied on legislative findings to uphold the civil rights provision of VAWA.²⁶⁰ *Doe*

despite extensive congressional findings), *rev'd*, No. 96-2316, 1997 WL 785529 (4th Cir. Dec. 23, 1997).

253. See S. REP. NO. 103-138, at 54 (listing the many effects of gender-based violence on interstate commerce). See generally Jean Abbott et al., *Domestic Violence Against Women: Incidence and Prevalence in an Emergency Department Population*, 273 JAMA 1763, 1763-67 (1995) (reporting on the connection between domestic violence and emergency medical care); Lisa Genasci, *Violence at Home Affects Workplace*, THE REGISTER-GUARD (Eugene, Or.), Dec. 25, 1994, at 5C (discussing the connection between domestic violence and job performance and health care).

254. See *Brzonkala*, 935 F. Supp. at 789-90. Judge Kiser stated that congressional regulation must be related to actual effects on commerce, not just effects perceived by Congress. See *id.* at 789. Thus, while the *Brzonkala* district court commended Congress's ability to draw from prior legislative analysis when enacting regulations, Judge Kiser required more than an inference of a merely anticipatory effect on interstate commerce. See *id.* at 790.

255. See *id.* at 789-90. Congress adopted findings concerning the connection between guns in schools and interstate commerce prior to the Supreme Court arguments in *Lopez*. See *United States v. Lopez*, 514 U.S. 549, 563 n.4 (1995).

256. See S. REP. NO. 103-138, at 54 (detailing the many forms in which gender-based violence affects interstate commerce); *supra* notes 214-16 and accompanying text (detailing the Fourth Circuit's discussion of the importance of congressional findings).

257. See *Brzonkala v. Virginia Polytechnic & State Univ.*, No. 96-2316, 1997 WL 785529, at *17-19 (4th Cir. Dec. 23, 1997).

258. See *id.* at *20.

259. See *id.* See generally Christopher J. Sprigman, Comment, *Standing on Firmer Ground: Separation of Powers and Deference to Congressional Findings in the Standing Analysis*, 59 U. CHI. L. REV. 1645 (1992) (advocating deference to congressional findings when interpreting regulations).

260. See *Doe*, 929 F. Supp. at 614; see also Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 785 (1996) (suggesting three ways to insure the validation of legislation, in-

also recognized that *Lopez* did not rely on substantial congressional findings because they did not exist.²⁶¹ The court in *Doe* noted that Congress took care to establish a sufficient connection to interstate commerce when it enacted VAWA.²⁶²

In the wake of *Lopez*, the Fourth Circuit and *Doe* recognized the importance of congressional findings when examining the constitutionality of congressional exercises of power.²⁶³ Thus, both courts found that Congress took sufficient steps to ensure that courts could recognize the connection to interstate commerce.²⁶⁴

B. Complementing State Powers to Provide Additional Remedies

Traditionally, courts view congressional regulations as either infringing on states' rights²⁶⁵ or complementing them.²⁶⁶ When state or federal

cluding the clear enunciation of legislative findings connecting a regulated act to interstate commerce). Since *Lopez*, other courts have relied on congressional findings to uphold federal regulations as constitutional under the Commerce Clause. See *United States v. Sage*, 906 F. Supp. 84, 90 (D. Conn. 1995) (relying on an "abundance" of legislative findings to uphold the Child Support Recovery Act of 1992), *aff'd*, 92 F.3d 101 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997); see also Ronald S. Kornreich, Note, *The Constitutionality of Punishing Deadbeat Parents: The Child Support Recovery Act of 1992 After United States v. Lopez*, 64 *FORDHAM L. REV.* 1089, 1117-18 (1995) (discussing the congressional findings accompanying the Child Support Recovery Act of 1992).

261. See *Doe*, 929 F. Supp. at 613; see also Friedman, *supra* note 260, at 758 (noting that between the circuit court decision and the Supreme Court hearing, Congress adopted findings concerning the connection between guns in school zones and interstate commerce). The congressional findings purported to find a nexus between nationwide firearm violence and interstate commerce, but were disregarded by the *Lopez* Court. See *id.* at 758 & n.4.

262. See *Doe*, 929 F. Supp. at 613-14 (discussing congressional findings concerning the connection between gender-based violence and interstate commerce); Julie Goldscheid, *Will a Vital New Women's Right be Withdrawn?*, *NAT'L L.J.*, Aug. 26, 1996, at A20 (outlining the documented connection between gender-based violence and interstate commerce).

263. See *Brzonkala*, 1997 WL 785529, at *17-19; *Doe*, 929 F. Supp. at 613-14; see also *supra* note 241 (noting that Congress enacted VAWA prior to the Supreme Court's decision in *Lopez*).

264. See *Brzonkala*, 1997 WL 785529, at *17-19; *Doe*, 929 F. Supp. at 613-14 (supporting the use of congressional findings in this type of situation). But see *Oregon v. Mitchell*, 400 U.S. 112, 204 (1970) (Harlan, J., concurring in part and dissenting in part) (stating that while congressional findings may be helpful, the judiciary must make an independent determination); Wille, *supra* note 2, at 1088-89 (advocating that courts should not defer to congressional judgment when determining whether Congress exceeded its power).

265. Cf. Stern, *supra* note 47, at 645 (noting that in the early years of the nation there was little desire for "intrusion" by the state or federal governments into commercial regulation).

266. See *Brzonkala*, 1997 WL 785529, at *22-23 (noting that VAWA does not restrict a person's ability to bring state claims against an alleged violator); *Doe*, 929 F. Supp. at 616 (noting that VAWA provides an additional remedy for victims of gender-based violence);

remedies are inadequate, Congress may provide supplemental relief as a complement to existing legislation.²⁶⁷ Congress's regulation of one aspect of a broad area of activity does not prohibit the states from regulating other aspects.²⁶⁸ Likewise, the existence of state regulation does not prohibit the federal government from providing additional remedies.²⁶⁹

The narrow statutory language of VAWA indicates Congress's intent to complement states' regulatory powers.²⁷⁰ Congress explicitly provided for a civil rights remedy to ensure equal protection of the law.²⁷¹ Because

S. REP. NO. 102-197, at 53 (1991) (stating that VAWA provides a remedy to fill the gaps of existing state laws); 141 CONG. REC. S1620-21 (daily ed. Jan. 26, 1995) (statement of Sen. Bradley) (advocating collaborative efforts of the federal and state governments to combat violence against women); Editorial, *Violence Against the Constitution*, WASH. TIMES, Aug. 7, 1996, at A16 (quoting Maryland Representative Constance Morella's statement that invalidation of VAWA leaves victims at the mercy of the states, where adequate remedies may not be available). This editorial supported Judge Kiser's opinion, arguing that no connection existed between violence against women and interstate commerce. See *id.* But see Julie Goldscheid, Letter to the Editor, *Congress Was Within Its Rights to Protect Civil Rights*, WASH. TIMES, Aug. 16, 1996, at A20 (responding to the Aug. 7, 1996 editorial and stating that "gender-based crimes such as domestic violence, rape and sexual assault violate women's civil rights and have a direct impact on interstate commerce, just like other civil rights laws").

267. See *Developments in the Law: Legal Responses to Domestic Violence—New State and Federal Responses to Domestic Violence*, 106 HARV. L. REV. 1528, 1532-33 (1993) (discussing the inadequacy of tort suits in protecting battered women); see also Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 270-71 (1987) (same); Stephen B. Reed, Note, *The Demise of Ozzie and Harriet: Effective Punishment of Domestic Abusers*, 17 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 337, 354 (1991) (same).

268. See *supra* notes 44-45 (discussing the concept of federalism), 221 and accompanying text.

269. See S. REP. NO. 102-197, at 49 (1991); cf. *Brzonkala*, 1997 WL 785529, at *22 (advocating a harmonization of federal regulation with existing state laws).

270. See *Brzonkala*, 1997 WL 785529, at *22; *Doe*, 929 F. Supp. at 616; see also Goldscheid & Kraham, *supra* note 30, at 507 (stating that the civil rights provision also complements existing federal law). VAWA not only complements existing state and federal civil rights laws, but the Act also criminalizes interstate domestic violence and interstate violation of a protection order. See 18 U.S.C. §§ 2261-2262; *supra* note 23 (discussing VAWA's full faith and credit provision for protection orders). VAWA's criminal causes of action supplement rather than supplant existing federal and state criminal causes of action. See Pamela A. Paziotopoulos, *Violence Against Women Act: Federal Relief for State Prosecutors*, PROSECUTOR, May/June 1996, at 20 (commenting that VAWA's new criminal causes of action allow federal prosecutors to aid in prosecuting domestic violence cases). The legislative history of VAWA further indicates that the civil rights remedy also was intended to complement existing federal civil rights laws. See S. REP. NO. 102-197, at 51.

271. See H.R. CONF. REP. NO. 103-711, at 385 (1994) (noting the inadequacy of existing laws in protecting survivors of gender-based violence).

VAWA does not encroach upon states' rights, but complements them, it is a proper exercise of Congress's commerce power.²⁷²

Congress's clear intent was to exclude from VAWA's reach state criminal law and areas of civil regulation.²⁷³ Furthermore, through VAWA, Congress intended to combat only those gender-based crimes that had a substantial effect on interstate commerce.²⁷⁴ Under VAWA, Congress may regulate only gender-motivated crimes.²⁷⁵ Specifically, states will continue to regulate those gender-related actions that do not have a substantial relation to interstate commerce.

C. *Steering Away from Lopez and Finding a Connection to Interstate Commerce*

Since *Lopez*, lower federal courts have distinguished the Supreme Court's decision.²⁷⁶ Courts have affirmed Congress's ability to regulate everything from guns and narcotics to beef promotion and research.²⁷⁷

272. See *Doe*, 929 F. Supp. at 616; cf. Anita F. Hill, *The Paula Problem*, NEWSWEEK, June 9, 1997, at 38 (advocating continued federal regulation of civil rights violations). Hill stated that, "[s]exual-harassment claims are really about violations of the alleged victims' civil rights, and there is no better forum for determining and assessing those violations—and finding the truth—than federal courts." *Id.* The legislative history of VAWA clearly supports the belief that federal law can complement state law. See S. REP. NO. 102-197, at 49 ("Each and every one of the existing [federal] civil rights laws covers an area in which some aspects are also covered by State laws.").

273. See 42 U.S.C. § 13981(e)(4) (1994). Federal jurisdiction excludes "any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree." *Id.*; see also S. REP. NO. 102-197, at 48 (rejecting the notion that the civil rights remedy acts as a "[f]ederal divorce law").

274. See *id.* § 13981(a); *supra* note 32 (quoting the text of the civil rights provision of VAWA); see also *supra* notes 28, 257-64 and accompanying text (describing the intent of both the Senate and House of Representatives to regulate only those acts of gender-based violence having a substantial effect on interstate commerce).

275. See *id.* § 13981(e)(1). The limitation on regulation under this provision reads:

Nothing in this section entitles a person to a cause of action . . . for random acts of violence unrelated to gender or for acts that cannot be demonstrated, by a preponderance of the evidence, to be motivated by gender.

Id. Furthermore, the statute was not designed to provide a remedy for victims of "random muggings or beatings in the home or elsewhere." S. REP. NO. 102-197, at 48 (1991).

276. See *Anisimov v. Lake*, No. 97-C-263, 1997 WL 538718, at *11-12 (N.D. Ill. Aug. 26, 1997) (distinguishing *Lopez* and upholding a claim under VAWA's civil rights provision); *Doe v. Hartz*, 970 F. Supp. 1375, 1434 (N.D. Iowa 1997) (giving deference to congressional findings despite the *Lopez* decision); *Doe v. Doe*, 929 F. Supp. 608, 615 (D. Conn. 1996).

277. See, e.g., *United States v. Bennett*, 75 F.3d 40, 45 (1st Cir.) (involving the federal regulation of possession of a firearm by a convicted felon), *cert. denied*, 117 S. Ct. 130 (1996); *United States v. Leshuk*, 65 F.3d 1105, 1111-12 (4th Cir. 1995) (finding federal regulation of the sale and possession of narcotics constitutional); *Goetz v. Glickman*, 920 F. Supp. 1173, 1179 (D. Kan. 1996) (affirming the constitutionality of the Beef Promotion

Courts continue to uphold congressional regulation in these areas, rather than strike down the statutes as being too remotely tied to the Commerce Clause, as *Lopez* suggests.²⁷⁸

Based on the Fourth Circuit's decision in *Brzonkala*, the current trend among lower courts and the weight of Supreme Court precedent, the Supreme Court likely would uphold the civil rights provision of VAWA under the Commerce Clause.²⁷⁹ A string of cases indicate that Congress need only establish a rational basis to enact Commerce Clause regulation.²⁸⁰ For example, in upholding the constitutionality of the Child Sup-

and Research Act of 1985).

278. See *Doe*, 929 F. Supp. at 615. For example, a plethora of lower courts have upheld the validity of the Child Support Recovery Act of 1992, an Act similar in purpose and effect to VAWA. See, e.g., *United States v. Collins*, 921 F. Supp. 1028 (W.D.N.Y. 1996) (finding the Child Support Recovery Act constitutional); *United States v. Kegel*, 916 F. Supp. 1233 (M.D. Fla. 1996) (same); *United States v. Sage*, 906 F. Supp. 84 (D. Conn. 1995) (same), *aff'd*, 92 F.3d 101 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997); *United States v. Hopper*, 899 F. Supp. 389 (S.D. Ind. 1995) (same); *United States v. Hampshire*, 892 F. Supp. 1327 (D. Kan. 1995) (same), *aff'd*, 95 F.3d 999 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 753 (1997); see also *United States v. Parker*, 911 F. Supp. 830 (E.D. Pa. 1995) (finding the Child Support Recovery Act unconstitutional), *rev'd*, 108 F.3d 28 (3d Cir.), *cert. denied*, 118 S. Ct. 111 (1997); *United States v. Bailey*, 902 F. Supp. 727 (W.D. Tex. 1995) (same), *rev'd*, 115 F.3d 1222 (5th Cir. 1997) (same); *United States v. Mussari*, 894 F. Supp. 1360 (D. Ariz. 1995) (same), *rev'd*, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, *Shroeder v. United States*, 117 S. Ct. 1567 (1997); *United States v. Schroeder*, 894 F. Supp. 360 (D. Ariz. 1995), *rev'd sub nom. United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, *Shroeder v. United States*, 117 S. Ct. 1567 (1997). See generally Kornreich, *supra* note 260, at 1089 (discussing the constitutionality of the 1992 Child Support Recovery Act); Amy E. Watkins, Comment, *The Child Support Recovery Act of 1992: Squeezing Blood From a Stone*, 6 SETON HALL CONST. L.J. 845 (1996) (same); Rebecca A. Wistner, Comment, *Abusing the Power to Regulate: The Child Support Recovery Act of 1992*, 46 CASE W. RES. L. REV. 935 (1996) (same).

279. See *Brzonkala*, 1997 WL 785529, at *26; Liuzzo, *supra* note 236 (asserting that if *Lopez* is correctly applied, the Supreme Court would uphold the constitutionality of the civil rights provision of VAWA under the Commerce Clause); Johanna R. Shargel, Note, *In Defense of the Civil Rights Remedy of the Violence Against Women Act*, 106 YALE L.J. 1849, 1851 (1997) (arguing that VAWA is constitutional under the Commerce Clause and the Fourteenth Amendment); Megan Weinstein, Recent Development, *The Violence Against Women Act After United States v. Lopez: Defending the Act From Constitutional Challenge*, 12 BERKELEY WOMEN'S L.J. 119, 131 (1997) (defending the constitutionality of VAWA).

280. See, e.g., *United States v. Knutson*, 113 F.3d 27, 31 (5th Cir. 1997) (concluding that Congress had a rational basis for regulating the transfer and possession of machine guns); *United States v. Parker*, 108 F.3d 28, 30 (3d Cir.) (utilizing the rational basis test to uphold the validity of the Child Support Recovery Act of 1992), *cert. denied*, 118 S. Ct. 111 (1997); *United States v. Olin Corp.*, 107 F.3d 1506, 1509 (11th Cir. 1997) (following the same rational basis analysis when determining the constitutionality of the Comprehensive Environmental Response, Compensation and Liability Act); *United States v. Bramble*, 103 F.3d 1475, 1482 (9th Cir. 1997) (using the rational basis test to uphold the Eagle Protection Act as a valid exercise of the commerce power); *Terry v. Reno*, 101 F.3d 1412, 1415-16 (D.C. Cir. 1996) (evaluating the connection between anti-abortion activities and

port Recovery Act of 1992,²⁸¹ the court in *United States v. Sage*²⁸² found that withholding child support payments results in less spending by the intended recipients of the funds.²⁸³ In today's mobile society, a parent living in Ohio might owe money to support a child living in Connecticut.²⁸⁴ Failure of the parent to pay causes less spending in Connecticut.²⁸⁵ This simple case of supply and demand substantially affects interstate commerce, thus providing a rational basis for congressional commerce power regulation.²⁸⁶

Similarly, the civil rights provision of VAWA survives constitutional challenge under this analysis by passing the rational basis standard. Using Congress's findings as a stepping stone, it logically follows that women who are victims of gender-motivated violence are less likely to travel interstate or participate in interstate business transactions.²⁸⁷ Gender-motivated violence restricts these interstate activities. By prohibiting and discouraging the movement of individuals between states, the national economy and interstate commerce are substantially affected.²⁸⁸

Congress took affirmative steps to establish congressional findings connecting gender-motivated crimes to interstate commerce so that VAWA would meet the minimum standards required by *Lopez*.²⁸⁹ Yet

interstate commerce), *cert. denied*, 117 S. Ct. 2431 (1997); *cf.* *United States v. Virginia*, 116 S. Ct. 2264, 2295-96 (1996) (affirming the application of rational basis review to sex-based claims of discrimination); *County of Washington v. Gunther*, 452 U.S. 161, 176 (1981) (utilizing a rational basis test when looking at wage discrimination); *Doe v. Doe*, 929 F. Supp. 608, 610 (1996).

281. 18 U.S.C. § 228 (1994).

282. 906 F. Supp. 84 (D. Conn. 1995), *aff'd*, 92 F.3d 101 (2d Cir. 1996), *cert. denied*, 117 S. Ct. 784 (1997).

283. *See id.* at 90.

284. This example is an expansion of the possible situation in *Sage*. *Cf. id.* at 87. The facts of *Sage* indicate that after the father who resided in Ohio failed to pay child support in Connecticut, Ohio authorities issued a warrant for his arrest. *See id.*

285. *See id.* at 90.

286. *See id.* at 92.

287. *See Doe*, 929 F. Supp. at 613-14 (relying on congressional findings to uphold the civil rights provision of VAWA under Congress's commerce power); *cf. Wisconsin v. Mitchell*, 508 U.S. 476, 487-88 (1993) (contending that "bias-inspired" crimes "inflict greater individual and societal harm . . . [because they] are more likely to provoke retaliatory crimes, . . . and incite community unrest").

288. *See Doe*, 929 F. Supp. at 613-14. (upholding VAWA as a valid exercise of the commerce power because of the substantial effect gender-based violence has on interstate commerce); Shargel, *supra* note 279, at 1850 ("[T]he disabling physical and psychological effects of violence have kept women from participating as commercial actors, and their absence from the nation's marketplace has had a substantial effect on interstate commerce.").

289. *See supra* Part III.A. (discussing the impact of congressional findings on the constitutionality of VAWA).

the Court, in its current makeup, still may decide that these findings are too tenuous to adequately support such a connection.²⁹⁰ To hold VAWA's civil rights provision unconstitutional, however, would require the Court to revisit the same issues addressed in *Lopez* and to disregard its own suggestion that congressional findings aid the Court in drawing connections to interstate commerce.²⁹¹ Although uncertainty exists as to whether the Court would reevaluate the *Lopez* standard, several years have passed since the Court's decision in *Lopez* and the issue may again be ripe for review.²⁹²

IV. CONCLUSION

Violence against women occurs at an alarming rate in the United States. Congress enacted the Violence Against Women Act as a response to the increasing amount of gender-based violence. Although neither VAWA, nor any act of Congress, can categorically stop such violence, the Act does provide a civil and equitable remedy for survivors of these crimes which will assist in achieving this goal. The Supreme Court should uphold the civil rights provision of VAWA as a valid exercise of congressional authority to regulate those activities having a substantial relation to interstate commerce. The Court should respond to the growing concerns surrounding gender-motivated violence by upholding the civil rights provision of VAWA. In passing the statute, Congress has met the minimum conditions demanded by *Lopez*—that a statute be rationally related to an activity substantially affecting interstate commerce, and use a reasonably adapted means to achieve that end. The Constitution requires no more, and women deserve no less than the right to be free from gender-based crimes.

290. See *Brzonkala v. Virginia Polytechnic & State Univ.*, No. 96-2316, 1997 WL 785529, at *30 (4th Cir. Dec. 23, 1997) (Luttig, J., dissenting) (referring to the Fourth Circuit majority opinion in *Brzonkala* by stating, "I suspect that, even in its discretion, the Supreme Court would not allow today's decision to stand").

291. Cf. Linda Greenhouse, *Justices Forgo Opportunity to Expand on Recent Commerce-Clause Ruling in Gun Case*, N.Y. TIMES, May 2, 1995, at A13 (noting that the Court often "await[s] further developments in the lower courts" before revisiting an issue).

292. See *id.*; see also *United States v. Robertson*, 514 U.S. 669 (1995) (per curiam). Decided just days after the Court issued the *Lopez* decision, *Robertson* raised an even more direct issue concerning the effect of an activity on interstate commerce. See *Robertson*, 514 U.S. at 670-71. The Court, without even referencing *Lopez*, decided that an Alaskan gold mine was sufficiently connected to interstate commerce simply because it hired employees from out-of-state. See *id.* at 671-72. The *Robertson* opinion indicates the Court's own reluctance to apply *Lopez*. See Greenhouse, *supra* note 291, at A13 (discussing the conflicting outcomes of the *Lopez* and *Robertson* opinions).

